

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 115

THE UNITED STATES OF AMERICA, PETITIONER

VS.

WILLIAM R. JOHNSON

No. 116

THE UNITED STATES OF AMERICA, PETITIONER

VS.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P.
KELLY, AND STUART SOLOMON BROWN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 6, 1945
CERTIORARI GRANTED OCTOBER 8, 1945

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 7500. *vs.*
WILLIAM R. JOHNSON,
Defendant-Appellant.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 7501. *vs.*
JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM
P. KELLY AND STUART SOLOMON BROWN,
Defendants-Appellants.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

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PLEAS had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois, begun and held in the United States Court Room in the City of Chicago, in the division and District aforesaid on the first Monday of November (it being the 6th day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-four and of the Independence of the United States of America the 168th year. Recita

Present:

Honorable John P. Barnes, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. LaBuy, District Judge
Honorable Elwyn R. Shaw, District Judge
Honorable William H. Holly, District Judge

Roy H. Johnson, *Clerk*

William H. McDonnell, Esquire, *Marshal*

On Friday, December 15, 1944

Court met pursuant to adjournment

Present: Honorable John P. Barnes, Trial Judge.

IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

United States of America

v.

William R. Johnson, Jack Sommers,
James A. Hartigan, William P. Kelly
and Stuart Solomon Brown

No. 32168

BE IT REMEMBERED that on the 27th day of March A.D. 1944 there was filed in the Clerk's office of said Court a certain petition of Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown for allowance of an appeal in words and figures following, to-wit:

(Petition of Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown for allowance of an appeal is not copied here as the same is set out in full in the Bill of Exceptions.)

And on, the same day to wit, the 27th day of March A.D. 1944 there was filed in the Clerk's office of said Court a certain petition of William R. Johnson for allowance of an appeal in words and figures following, to wit:

(Petition of William R. Johnson for allowance of an appeal is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards, to wit, on the 29th day of March A.D. 1944, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

(Order of the District Court of the United States, entered on the 29th day of March, A.D. 1944, is not copied here as the same is set out in full in the Bill of Exceptions.)

And on the same day, to wit, on the 29th day of March A.D. 1944, being one of the days of the regular March term of said Court, in the record of proceedings thereof,

in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

(Order of the District Court of the United States, entered on the 29th day of Mar., A.D. 1944 is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards on, to wit, the 28th day of November A.D. 1944 there was filed in the Clerk's office of said Court a certain Certified Copy of Order from Circuit Court of Appeals in words and figures following, to wit:

(Order of the U. S. Circuit Court of Appeals, filed on the 28th day of November, 1944, is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards, on the same day to wit, on the 28th day of November A.D. 1944, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

(Order entered on the 28th day of November, A.D. 1944, is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards on, to wit, the 30th day of November A.D. 1944 came the defendants by their attorneys and filed in the Clerk's office of said Court certain Notice and Motion For Production of Documents in words and figures following, to wit:

(Notice and Motion of the defendants for Protection of Documents are not copied here as the same are set out in full in the Bill of Exceptions.)

And on the same day, to wit, on the 30th day of November A.D. 1944, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

(Order entered on November 30, 1944, is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards on, to wit, the 4th day of December A.D. 1944 came the defendants by their attorneys and filed in the Clerk's office of said Court a certain Notice and Amend-

ed Motion For New Trial and Exhibits Attached to And Forming Part of said Amended Motion in words and figures following, to wit:

(Notice and Amended Motion For New Trial and Exhibits Attached To And Forming Part of said Amended Motion are not copied here as the same are set out in full in the Bill of Exceptions.)

And afterwards on, to wit, the 7th day of December A.D. 1944 came the Government by its attorneys and filed in the Clerk's office of said Court certain Notice and Government's Answer to Defendants' Amended Motion For New Trial in words and figures following, to wit:

(Notice and Government's Answer to Defendants' Amended Motion for New Trial are not copied here as the same are set out in full in the Bill of Exceptions.)

And afterwards on, to wit, the 11th day of December A.D. 1944 came the defendants by their attorneys and filed in the Clerk's office of said Court certain Notice and Reply Of Defendants To Government's Answer To Defendants' Amended Motion For New Trial in words and figures following, to wit:

(Notice and Reply of Defendants to Government's Answer to Defendants' Amended Motion For New Trial are not copied here as the same are set out in full in the Bill of Exceptions.)

And afterwards on, to wit, the 15th day of December A.D. 1944 there was filed in the Clerk's office of said Court a certain opinion of the Court entitled "Memorandum" in words and figures following, to wit:

(Opinion of the Court entitled "Memorandum" is not copied here as the same is set out in full in the Bill of Exceptions.)

And on the same day, to wit, on the 15th day of December A.D. 1944, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

(Order of the District Court of the United States entered on the 15th day of December, A.D. 1944, denying the defendants' amended motion for a new trial, is not copied here as the same is set out in full in the Bill of Exceptions.)

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division

Friday, December 15, 1944

Present:

Honorable John P. Barnes, District Judge

* * (Caption—Docket No. 32168) * *

The defendants by their counsel pray an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order this day entered herein, which appeal is allowed.

And afterwards, to wit, the 19th day of December A.D. 1944 came the defendant Stuart Solomon Brown by his attorney and filed in the Clerk's office of said Court a certain Notice and Motion To Modify Order of December 15, 1944 Denying Defendants' Amended Motion For A New Trial in words and figures following, to wit:

(Notice and Motion to Modify Order of December 15, 1944, Denying Defendants' Amended Motion For A New Trial are not copied here as the same are set out in full in the Bill of Exceptions.)

And on the same day to wit, on the 19th day of December A.D. 1944, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

This day comes the defendant Stuart Solomon Brown and by his counsel enters herein his motion for modification of the order entered on December 15, A.D. 1944 and the Court having heard arguments of counsel and being fully advised in the premises said motion is denied.

And afterwards on, to wit, the 21st day of December A.D. 1944 came the defendant William R. Johnson by his attorneys and filed in the Clerk's office of said Court a certain Notice of Appeal in words and figures following, to wit:

(Notice of Appeal is not copied here as the same is set out in full in the Bill of Exceptions.)

And on the same day, to wit, the 21st day of December A.D. 1944 came the defendants Jack Sommers, et al by their attorneys and filed in the Clerk's office of said Court a certain Notice of Appeal in words and figures following, to wit:

(Notice of Appeal is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards, to wit, on the 22nd day of December A.D. 1944 being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

(Order that parties appear on December 27, 1944 for directions as to the preparation of the record on appeal is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards, to wit, on the 27th day of December A.D. 1944, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

(Order fixing time for settling Bill of Exceptions and for filing Assignment of Errors is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards on, to wit, the 13th day of January A.D. 1944 came the defendants by their attorneys and filed in the Clerk's office of said Court a certain Praeceptum For Record in words and figures following, to wit:

(Praeceptum for Record is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards on, to wit, the 17th day of January A.D. 1945 came the defendants by their attorneys and filed in the Clerk's office of said Court certain Assignment of Errors in words and figures following, to wit:

(Assignment of Errors is not copied here as the same is set out in full in the Bill of Exceptions.)

And afterwards on, to wit, the 19th day of January A.D. 1945 came the defendants by their attorneys and filed in the Clerk's office of said Court certain Notice and Motion

To Settle Bill of Exceptions in words and figures following,
to wit:

(Notice and Motion to Settle Bill of Exceptions
are not copied here.)

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

United States of America

vs.

William R. Johnson, Jack Sommers,
James A. Hartigan, William P.
Kelly and Stuart Solomon Brown.

No. 32,168

INDEX TO BILL OF EXCEPTIONS.

VOLUME I.

Volume I of Bill of Exceptions, approved and filed on
January 28, 1944, which is comprised of the following:

Order entered on October 15, 1943, by the United States
Circuit Court of Appeals for the Seventh Circuit.

Motion of defendants for the Court to fix and determine
a short day wherein the defendants may file with the Clerk
of this Court a motion for a new trial.

Order of this Court entered on October 19, 1943, fixing
the time within which defendants may file motion for a new
trial and within which Government may file reply thereto.

Motion of defendants for a new trial and brief in support
of said motion.

Government's answer to defendants' motion for a new
trial.

Appendix to defendants' brief in support of a motion for
a new trial.

Brief of Government in opposition to defendants' mo-
tion for a new trial.

Affidavit of Frank Sampson (Govt. Ex. 23) and affidavit
of Lawrence LaCharity (Govt. Ex. 24).

Defendants' reply brief.

Affidavit of Louis Baum (Defts. Ex. 73).

Affidavit of Leo E. Blockus (Defts. Ex. 72).

Photostatic copy of request for subpoenas and Marshal's Return (Govt. Ex. 2), affidavit of Nate Jacobs (Govt. Ex. 21) and Government's Ex. 22.

Minutes of proceedings had on November 15, 1943, at the conclusion of oral argument on motion for a new trial.

VOLUME II.

Volume II of Bill of Exceptions approved and filed on January 28, 1944, which is comprised of Exhibit consisting of printed bill of exceptions (Volume I and Volume II) in appeals Nos. 7500 and 7501, *United States v. William R. Johnson*, and *United States v. Sommers, et al.*

VOLUME III.

Volume III of Bill of Exceptions approved and filed on January 28, 1944, which is comprised of the following:

Memorandum of Opinion on defendants' motion for a new trial filed herein by this Court on the 28th day of December, 1943.

Minutes of proceedings had on December 31, 1943.

Order of Court entered herein on December 31, 1943, denying the defendants' motion for a new trial.

Assignments of error.

Motion to settle and sign bill of exceptions. Order entered herein on January 26, 1944.

Certified copies of applications of the defendants for subpoenas for the appearance of William Goldstein and J. L. Smith, for subpoenas duces tecum to Piazza and O'Donnell, Piper Service Station, Inc. and Sinclair Oil Company, subpoenas and return of Marshall thereon.

VOLUME IV.

Volume IV of Bill of Exceptions approved and filed on January 28, 1944, which is comprised of transcript of stenographic notes of the proceedings at the trial herein (Pages 21 to 1651).

VOLUME V.

Volume V of Bill of Exceptions approved and filed on January 28, 1944, which is comprised of transcript of stenographic notes of the proceedings at the trial herein (Pages 1652 to 3399).

VOLUME VI.

Volume VI of Bill of Exceptions approved and filed on January 28, 1944, which is comprised of transcript of stenographic notes of the proceedings at the trial herein (Pages 3400 to 4961).

VOLUME VII.

Volume VII of Bill of Exceptions approved and filed on January 28, 1944, which is comprised of transcript of stenographic notes of the proceedings at the trial herein (Pages 4962 to 6592, and Pages 6637 to 6644).

VOLUME VIII.

Petition of Jack Sommers, et al, that they be permitted to take an appeal.

Petition of William R. Johnson that he be permitted to take an appeal.

Order entered March 29, 1944, allowing said appeal by Jack Sommers, et al.

Order entered March 29, 1944, allowing said appeal by William R. Johnson.

Certified copy of order of United States Circuit Court of Appeals entered on November 16, 1944, remanding the cause to the District Court with directions.

Order entered on November 28, 1944, prescribing the time for the filing of the amended motion for a new trial, Government's answer thereto, and reply of defendants, and setting hearing on said motion.

Notice and motion of defendants for production of documents.

Order entered November 30, 1944, for production of documents.

Notice and amended motion for a new trial and exhibits attached to and forming part of said motion, filed on December 4, 1944.

Notice and Government's answer to defendants' amended motion for a new trial.

Notice and defendants' reply to Government's answer to defendants' amended motion for a new trial.

VOLUME IX.

Memorandum opinion of Court filed on December 15, 1944.

Order entered December 15, 1944, denying and overruling defendants' amended motion for a new trial.

Minutes of proceedings had on December 15, 1944, in which Court allowed appeal.

Notice and motion to modify order of December 15, 1944.

Minutes of proceedings had on December 19, 1944, in which Court denied motion to modify.

Notice of appeal of William R. Johnson.

Notice of appeal of Jack Summers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown.

Order entered on December 22, 1944, that parties appear for directions with regard to the preparation of record on appeal.

Order entered on December 27, 1944, prescribing time within which Bill of Exceptions is to be settled and filed, and Assignment of Errors is to be filed.

Praecipe for record.

Assignment of Errors.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

(Caption—Docket No. 32,168)

BILL OF EXCEPTIONS.

Be it remembered that on the 16th day of October, 1943, the above entitled criminal cause came on before this Court, the Honorable John P. Barnes presiding, on the order of the United States Circuit Court of Appeals for the Seventh Circuit, entered on the 15th day of October, 1943, remanding the said cause to this Court, and that the following proceedings were thereafter had:

(The said proceedings so had are herein set forth in nine volumes, comprising this Bill of Exceptions, each of which said volumes sets forth and contains the following respective proceedings next listed under each of said volumes:

VOLUME I.

Volume I of Bill of Exceptions approved and filed on January 28, 1944, comprised of the following:

Order entered on October 15, 1943, by the United States Circuit Court of Appeals for the Seventh Circuit.

Motion of defendants for the Court to fix and determine a short day wherein the defendants may file with the Clerk of this Court a motion for a new trial.

Order of this Court entered on October 19, 1943, fixing the time within which defendants may file motion for a new trial and within which Government may file reply thereto.

Motion of defendants for a new trial and brief in support of said motion.

Government's answer to defendants' motion for a new trial.

Appendix to defendants' brief in support of a motion for a new trial.

Brief of Government in opposition to defendants' motion for a new trial.

Affidavit of Frank Sampson (Govt. Ex. 23) and affidavit of Lawrence LaCharity (Govt. Ex. 24).

Defendants' reply brief.

Affidavit of Louis Baum (Defts. Ex. 73).

Affidavit of Leo E. Blockus (Defts. Ex. 72).

Photostatic copy of request for subpoenas and Marshal's return (Govt. Ex. 2), affidavit of Nate Jacobs (Govt. Ex. 21) and Government's Ex. 22.

Minutes of proceedings had on November 15, 1943, at the conclusion of oral argument on motion for a new trial.

VOLUME II.

Volume II of Bill of Exceptions approved and filed on January 28, 1944, which is comprised of Exhibit consisting of printed Bill of Exceptions (Volume I and Volume II) in appeals Nos. 7500 and 7501, *United States v. William R. Johnson*, and *United States v. Sommers, et al.*

VOLUME III.

Volume III of Bill of Exceptions approved and filed on January 28, 1944, which is comprised of the following:

Memorandum of Opinion on defendants' motion for a new trial filed herein by this Court on the 28th day of December, 1943.

Minutes of proceedings had on December 31, 1943.

Order of Court entered herein on December 31, 1943, denying the defendants' motion for a new trial.

Assignments of error.

Motion to settle and sign bill of exceptions. Order entered herein on January 26, 1944.

Certified copies of applications of the defendants for subpoenas for the appearance of William Goldstein and J. L. Smith, for subpoenas *duces tecum* to Piazza and O'Donnell, Piper Service Station, Inc. and Sinclair Oil Company, subpoenas and return of Marshal thereon.

VOLUMES IV TO VII.

Volumes IV to VII of Bill of Exceptions approved and filed on January 28, 1944, which is comprised of the transcript of stenographic notes of the proceedings on the trial herein, including opening and closing arguments of counsel.

VOLUME VIII.

Petition of Jack Sommers, et al, that they be permitted to take an appeal.

Petition of William R. Johnson that he be permitted to take an appeal.

Order entered March 29, 1944, allowing said appeal by Jack Sommers, et al.

Order entered March 29, 1944, allowing said appeal by William R. Johnson.

Certified copy of order of United States Circuit Court of Appeals entered on November 16, 1944, remanding the cause to the District Court with directions.

Order entered on November 28, 1944, prescribing the time for the filing of the amended motion for a new trial, Government's answer thereto, and reply of defendants, and setting hearing on said motion.

Notice and motion of defendants for production of documents.

Order entered November 30, 1944, for production of documents.

Notice and amended motion for a new trial and exhibits attached to and forming part of said motion, filed on December 4, 1944.

Notice and Government's answer to defendants' amended motion for a new trial.

Notice and defendants' reply to Government's answer to defendants' amended motion for a new trial.

VOLUME IX.

Memorandum opinion of Court filed on December 15, 1944.

Order entered December 15, 1944, denying and overruling defendants' amended motion for a new trial.

Minutes of proceedings had on December 15, 1944, in which Court allowed appeal.

Notice and motion to modify order of December 15, 1944.

Minutes of proceedings had on December 19, 1944, in which Court denied motion to modify.

Notice of appeal of William R. Johnson.

Notice of appeal of Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown.

Order entered on December 22, 1944, that parties appear for directions with regard to the preparation of record on appeal.

Order entered on December 27, 1944, prescribing time within which Bill of Exceptions is to be settled and filed, and Assignment of Errors is to be filed.

Præcipe for record.

Assignment of Errors.)

I On the 27th day of March, 1944, the defendants, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, filed a petition praying that they be permitted to take an appeal, which said petition was in words and figures as follows, to-wit:

Filed
Mar. 27
1944

2 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—No. 32,168)

PETITION FOR ALLOWANCE OF AN APPEAL.

To:

The Honorable John P. Barnes,
Judge of the District Court of
the United States for the Northern
District of Illinois, Eastern Division.

Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, your petitioners, who are the defendants in the above-entitled cause pray that they be permitted to take an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order

denying the motion for new trial, entered in the above cause on the 31st day of December, 1943, for the reasons specified in the assignment of errors heretofore filed in this Court on the 22nd day of January, 1944.

(sgd) *Harold R. Schradzke*

Harold R. Schradzke,

*Attorney for Jack Sommers, James
A. Hartigan, William P. Kelly
and Stuart Solomon Brown*

Dated March 27th, 1944.

Appeal allowed this day of March, 1944.

.....
District Judge

Filed
Mar. 27,
1944

3 On the 27th day of March, 1944, the defendant, William R. Johnson, filed a petition praying that he be permitted to take an appeal, which said petition was in words and figures as follows, to-wit:

4 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

United States of America

vs.

William R. Johnson

} No. 32,168.

PETITION FOR ALLOWANCE OF AN APPEAL.

To:

The Honorable John P. Barnes,
Judge of the District Court of
the United States for the Northern
District of Illinois, Eastern Division.

William R. Johnson, your petitioner, who is the defendant in the above-entitled cause prays that he be permitted to take an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order denying.

the motion for new trial, entered in the above cause on the 31st day of December, 1943, for the reasons specified in the assignment of errors heretofore filed in this Court on the 22nd day of January, 1944.

(Sgd) William J. Dempsey

William J. Dempsey,

Attorney for William R. Johnson.

Dated March 27th, 1944.

Appeal allowed this day of March, 1944.

.....
District Judge.

5 Thereafter on the 29th day of March, 1944, this Court entered the following order in words and figures, to-wit:

Entered
Mar. 27
1944

6 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

• • • (Caption—D. C. No. 32168) • • •

ORDER.

This cause coming on to be heard on the petition of Jack Sommers, James A. Hartigan, William P. Kelly, and Stuart Solomon Brown, praying that, for the reasons specified in their Assignment of Errors heretofore filed in this Court on the 22nd day of January, 1944, they be permitted to take an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order of this Court denying their motion for a new trial, which order was entered on the 31st day of December, 1943; and it appearing to the Court

(1) That petitioners insist that they are entitled to an order allowing an appeal as a matter of right;

(2) That petitioners state to the Court no reason for the Court's now making an order allowing an appeal other than the reason set forth in sub-paragraph (1) hereof;

(3) That this is the first motion of this kind that has been presented to the Court since the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in Criminal Cases, promulgated on March 7, 1934, became effective;

(4) That this Court, not having been advised by counsel for the petitioners of any reason why an order allowing an appeal should now be made other than that set forth in sub-paragraph numbered (1) hereof, makes no finding as to whether or not an order allowing an appeal should or should not now be made;

(5) The Court particularly makes no finding as to whether or not this case is one of those in which appeals were authorized by law on March 8, 1934; and

(6) The order hereinafter made is made by the Court only because the petitioners insist that they are entitled to it as a matter of right and because the Court does not desire petitioners to be foreclosed of any right which they may have even though this Court be not advised of it, as it is not;

It is Ordered that for the reason specified in sub-paragraph (6), said appeal is allowed.

John P. Barnes

Judge

Entered this 29th day of
March, A. D. 1944.

Entered
Mar. 29,
1944

8 Thereafter on the 29th day of March, 1944, this Court entered the following order in words and figures, to-wit:

9 DISTRICT COURT OF THE UNITED STATES OF AMERICA
For the Northern District of Illinois

Eastern Division

* * (Caption—D. C. No. 32168) * *

ORDER

This cause coming on to be heard on the petition of William R. Johnson praying that, for the reasons specified

in his Assignment of Errors heretofore filed in this Court on the 22nd day of January, 1944, he be permitted to take an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order of this Court denying his motion for a new trial, which order was entered on the 31st day of December, 1943; and it appearing to the Court

(1) That petitioner insists that he is entitled to an order allowing an appeal as a matter of right;

(2) That petitioner states to the Court no reason for the Court's now making an order allowing an appeal other than the reason set forth in sub-paragraph (1) hereof;

(3) That this is the first motion of this kind that has been presented to the Court since the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in Criminal Cases, promulgated on March 7, 1934, became effective;

(4) That this Court, not having been advised by counsel for the petitioner of any reason why an order allowing an appeal should now be made other than that set forth in sub-paragraph numbered (1) hereof, makes no finding as to whether or not an order allowing an appeal should or should not now be made;

(5) The Court particularly makes no finding as to whether or not this case is one of those in which appeals were authorized by law on March 8, 1934; and

(6) The order hereinafter made is made by the Court only because the petitioner insists that he is entitled to it as a matter of right and because the Court does not desire petitioner to be foreclosed of any right which he may have even though this Court be not advised of it, as it is not;

It is Ordered that for the reason specified in sub-paragraph (6) said appeal is allowed.

John P. Barnes.

Judge

Entered this 29th day of
March, A. D. 1944.

Entered
Nov. 28,
1944

11 On the 28th day of November, 1944, there was filed with the Clerk of this Court a certified copy of an order entered by the United States Circuit Court of Appeals on November 16, 1944, which said order was in words and figures, to-wit:

12. IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

No. 7500

United States of America, *Plaintiff*,

vs.

William R. Johnson, *Defendant*.

No. 7501

United States of America, *Plaintiff*,

vs.

Jack Sommers, et al., *Defendants*.

ON MOTION TO REOPEN PROCEEDINGS ON DEFENDANTS' MOTION FOR NEW TRIAL.

Whereas, at the October Term, 1944, of the Supreme Court of the United States, there was pending in that Court defendants' petition for writs of certiorari to this court, and whereas,

On October 10, 1944, the Clerk of the Supreme Court of the United States, by letter, informed defendants' counsel as follows:

"I am authorized by the Court to inform you that your motion for deferment of consideration of the petition for certiorari in the cases of Nos. 153-154, *Johnson, et al. v. The United States*, is granted. The Court will withhold consideration of the petition conditioned upon the prompt filing in the Circuit Court of Appeals for the Seventh Circuit of a motion to reopen proceedings on the motion for new trial and until the disposition of that motion by the Circuit Court of Appeals.

"This Court should be kept informed by counsel for the petitioners respecting the presentation to and the action taken thereon by the Circuit Court of Appeals upon the motion which affords the basis for deferment of the consideration of these cases in this Court.

Yours very sincerely,

Charles Elmore Cropley"

Whereas, on October 13, 1944, the defendants filed in this Court their Motion to reopen the proceedings in this court on their motion for a new trial, and whereas

On October 30, 1944, plaintiff filed its answer to the defendants' motion to reopen that issue, and on October 31, 1944, this court permitted the defendants to file a reply to plaintiff's answer to the defendants' motion, within three days from the date of service of the answer, and that reply was filed on November 4, 1944.

Therefore, this court now reopens the proceedings and vacates its order affirming the order of the District Court denying defendants' motion for a new trial.

The cause is therefore remanded to the District Court, with directions to consider and dispose of the defendants' motion when and if filed in the District Court.

Thereupon the District Court is authorized and instructed to pass upon such amended motion for a new trial, and to certify its ruling to this court at an early date.

November 16, 1944

Before: Sparks, Major and Minton, Circuit Judges

A True Copy. Teste: (Seal)

Kenneth J. Carrick

Clerk

13 On the 28th day of November, 1944, this Court entered the following order in words and figures, to-wit:

14 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

(Caption—No. 32,168)

ORDER.

This matter having come on this day to be heard on a certain order of the United States Circuit Court of Ap-

peals for the Seventh Circuit, rendered on the 16th day of November, 1944, a certified copy whereof has, on this 28th day of November, 1944, been filed in the office of the Clerk of this court, and which certified copy is in the words and figures following:

15 IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit

No. 7500

United States of America, *Plaintiff*,

vs.

William R. Johnson,, *Defendant*.

No. 7501

United States of America, *Plaintiff*,

vs.

Jack Sommers, *et al.*, *Defendants*.

ON MOTION TO REOPEN PROCEEDINGS ON
DEFENDANTS' MOTION FOR NEW TRIAL.

Whereas, at the October Term, 1944, of the Supreme Court of the United States, there was pending in that Court defendants' petition for writs of certiorari to this court, and whereas,

On October 10, 1944, the Clerk of the Supreme Court of the United States, by letter, informed defendants' counsel as follows:

"I am authorized by the Court to inform you that your motion for deferment of consideration of the petition for certiorari in the cases of Nos. 153-154, *Johnson, et al. v. The United States*, is granted. The Court will withhold consideration of the petition conditioned upon the prompt filing in the Circuit Court of Appeals for the Seventh Circuit of a motion to reopen proceedings on the motion for new trial and

until the disposition of that motion by the Circuit Court of Appeals.

"This Court should be kept informed by counsel for the petitioners respecting the presentation to and the action taken thereon by the Circuit Court of Appeals upon the motion which affords the basis for deferment of the consideration of these cases in this Court.

Yours very sincerely,

Charles Elmore Cropley"

Whereas, on October 13, 1944, the defendants filed in this Court their motion to reopen the proceedings in this court on their motion for a new trial, and whereas...

On October 30, 1944, plaintiff filed its answer to the defendants' motion to reopen that issue, and on October 31, 1944, this court permitted the defendants to file a reply to plaintiff's answer to the defendants' motion, within three days from the date of service of the answer, and that reply was filed on November 4, 1944.

Therefore, this court now reopens the proceedings and vacates its order affirming the order of the District Court denying defendants' motion for a new trial.

The cause is therefore remanded to the District Court, with directions to consider and dispose of the defendants' motion when and if filed in the District Court.

Thereupon the District Court is authorized and instructed to pass upon such amended motion for a new trial, and to certify its ruling to this court at an early date. November 16, 1944.

Before: Sparks, Major and Minton, Circuit Judges

A True Copy Teste: (Seal)

Kenneth J. Carrick

Clerk

16 It is, on the court's motion Ordered that the defendants file in the office of the Clerk of this court, in writing, on or before the 4th day of December, 1944, such motion and supporting papers as the foregoing order of the United States Circuit Court of Appeals for the Seventh Circuit may authorize; that the United States file in the office of the Clerk of this court, in writing, on or before the 7th day of December, 1944, such answer

as the United States may deem necessary or advisable; that the defendants file in the office of the Clerk of this court, in writing, before 10 o'clock A.M. on the 11th day of December, 1944, such reply as they may deem necessary or advisable; and that the hearing upon such motion as may be filed pursuant to this order be set for 10 o'clock A.M. on the 11th day of December, 1944; and

Further Ordered that the Clerk of this court forthwith mail copies of this order to the attorneys for the respective parties.

Entered this 28th day of November, 1944.

(Sgd) *John P. Barnes*
Judge.

Filed
Nov. 30,
1944

17 Thereafter on the 30th day of November, 1944, there was filed by the defendants a notice of a motion for the production of documents, which said notice was in words and figures as follows, to-wit:

18 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 32168) * *
* * (Caption—No. 32168) * *

NOTICE.

To:

Hon. J. Albert Woll,
United States Attorney,
450 U. S. Court House,
Chicago, Illinois.

You Are Hereby Notified that the undersigned will on Thursday, November 30, 1944, at the hour of 10:00 o'clock A.M. before the Honorable John P. Barnes, one of the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, in the Courthouse usually occupied by him in the Federal court-house in Chicago, Illinois, or before such other judge as may be sitting in his stead, present a motion for an order

for the production of documents, a copy of which motion is hereto attached for your convenience.

Homer Cummings
Homer Cummings
Counsel for Defendants, William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown.

William J. Dempsey
William J. Dempsey
Counsel for Defendant, William R. Johnson.

19

Harold R. Schradzke
Harold R. Schradzke
Counsel for Defendants, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown.

Received a copy of the above and foregoing Notice, together with a copy of Motion therein referred to, this 29th day of November, 1944.

(Sgd) J. Albert Woll,
U. S. Attorney by E. Tillotson

20 On the 30th day of November, 1944, there was filed by the defendants a motion for the production of documents which said motion was in words and figures as follows, to-wit:

Filed
Nov. 30,
1944

21 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 32168) * *

MOTION FOR PRODUCTION OF DOCUMENTS.

Now come the defendants in the above entitled cause and move the Court for an order requiring the United States of America to produce and permit defendants to inspect and to copy each of the following documents:

The income tax returns of Theodore Goldstein of 415 Aldine Avenue, Chicago, Illinois, for the years 1937, 1938, 1939 and 1940, and the amended income tax returns of the same person for the years 1941, 1942 and 1943; for further particulars the said 1937, 1938 and 1939 returns were filed on, to-wit, July 12, 1944, and the 1940 returns were filed on September 23, 1944; the said amended returns were filed on September 23, 1944; all of the above referred to income tax returns were filed in the Chicago office of the Collector of Internal Revenue.

22 The said defendants respectfully represent unto the Court that during, to-wit, the October, 1944, term of the Supreme Court of the United States, in the proceedings entitled "William R. Johnson, et al vs. The United States of America", on Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the seventh Circuit, and being causes numbered 153 and 154, in the office of the Clerk of said Court, the Honorable Charles Fahy, Solicitor General, and the Honorable Samuel O. Clark, Jr., Assistant Attorney General, represented to said Court in a pleading entitled "Supplemental Memorandum for the United States in Opposition" that "Theodore Goldstein, son of William Goldstein, the Government witness, who petitioners contend committed perjury at their trial, has filed original income tax returns for the calendar years 1937 to 1940, inclusive, and amended returns for 1941 to 1943, inclusive, showing receipt of income during those years from the Albany Park Bank Building, one of the numerous investment properties regarding which Goldstein testified at the trial", and the said Solicitor General further delineated some of the material facts appearing on the face of the above referred to income tax returns.

These defendants further show to your Honor that they do not have possession, custody, control nor access to the originals of said returns for the purpose of presenting them to this Court in support of an amended motion for a new trial to be filed herein by order of this Court not later than December 4, 1944, but that on the contrary the United States of America has control, custody and possession thereof.

23 These defendants further respectfully represent that they cannot safely proceed to the filing of said amended motion for a new trial without access to the above referred

to returns, each and all of which returns are vital to the subject matter of said amended motion for a new trial. Each of the said returns is relevant to said amended motion for a new trial in that each of said returns discloses that William Goldstein, one of the witnesses who testified for the Government in the original trial herein, committed perjury on the trial of said cause and compounded such perjury by again committing perjury in this Court in affidavits filed by him in opposition to defendants' motion for a new trial under the proceedings recently had under Rule 2(3) of the Criminal Appeals Rules.

Wherefore, these defendants respectfully move your Honor to enter an order directing the United States of America and the Honorable Albert J. Woll, United States District Attorney for the Northern District of Illinois, Eastern Division, forthwith to produce or cause to be produced and to make available for the purpose of inspection and copying each of the said income tax returns above referred to, or in lieu thereof, to furnish to the defendants, within a short day and prior to December 4, 1944, certified copies of each of said income tax returns above referred to:

William R. Johnson, Jack Sommers,
James A. Hartigan, William P. Kelly,
and Stuart Solomon Brown.

By

(Sgd) *Homer Cummings*
Homer Cummings

(Sgd) *William J. Dempsey*
William J. Dempsey

(Sgd) *Harold R. Schradzke*
Harold R. Schradzke
Their Attorneys.

24 State of Illinois)
County of Cook) ss:

I, Harold R. Schradzke, having been duly sworn on my oath, do say that in conjunction with the other counsel of record for the defendants herein, I prepared the above entitled motion, and that I know the contents thereof and that I know and do say that all facts and representations of fact therein stated are true and correct as therein set

forth, and I do further say that this motion is not made for delay or for any other reason except as therein stated.

(Sgd) Harold R. Schradzke

Subscribed and sworn to before me
this 29th day of November, 1944.

(Sgd) Martha Merkel
Notary Public.

Entered
Nov. 30,
1944

25 Thereafter on the 30th day of November, 1944, this Court entered an order for the production of documents and the filing of certified copies thereof in the Clerk's office, which said order was in words and figures as follows, to-wit:

26 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division

* * (Caption—No. 32168) * *

ORDER.

This matter having come on before me to be heard upon the motion of the defendants herein for an order upon the United States of America to produce certain documents for inspection and copying, or in lieu thereof to produce certified copies of said documents, and due notice of said motion having been given, and the parties, by their respective counsel, having appeared before me in open Court, and the Court being fully advised in the premises,

Now, Therefore, It Is Ordered:

1. That the United States of America immediately make available to counsel of record for the defendants for the purpose of inspection and copying the following documents: The income tax returns of Theodore Goldstein of 415 Aldine Avenue, Chicago, Illinois, for the years 1937, 1938, 1939 and 1940, and the amended income tax returns of the same person for the years 1941, 1942 and 1943; the said 1937, 1938 and 1939 returns were filed on, to-wit, July 12, 1944, and the 1940 return was filed on September 23, 1944, and the said amended returns were filed on September 23, 1944.

27 2. That this inspection shall be made available to counsel for the defendants in the Office of the Commissioner of Internal Revenue in Washington, D. C. not later than 12:00 o'clock noon, Eastern War Time, Saturday, December 2, 1944; and the foregoing, certified copies of each of said returns shall be filed with the Clerk of this Court on or before 10:00 o'clock A.M., Central War Time, December 2, 1944, which said certified copies shall be open to the inspection and copying of the defendants' counsel and to the United States Attorney.

3. The United States District Attorney in and for this District is hereby ordered to cause the said returns to be made available to the defendants, as hereinabove set forth.

Enter:

(Sgd) Barnes
Judge

Dated: November 30, 1944.

28 The defendants on the 4th day of December, 1944, filed a notice of an amended motion for a new trial, which said notice was in words and figures as follows, to-wit:

Filed
Dec. 4,
1944

29 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division.

(Caption—No. 32,168)

NOTICE.

To:

Hon. J. Albert Woll,
United States Attorney,
450 U. S. Court House,
Chicago, Illinois.

You Are Hereby Notified that the defendants in the above entitled cause, are this day filing in the Office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, in his office in the United States Court House in Chicago, Illinois, an "Amended Motion for New Trial", a copy of which said

motion together with true and correct copies of each of the exhibits thereto attached, is herewith delivered to you for your convenience.

Homer Cummings,
William J. Dempsey and
Harold R. Schradzke,

Attorneys for the above named defendants.

By (Sgd) *Harold R. Schradzke.*
Harold R. Schradzke.

Received a copy of the within referred to motion and exhibits thereto attached this 4th day of December, A. D. 1944.

J. Albert Woll,
United States District Attorney.

By E. Tilleston.

Filed
Dec. 4,
1944

30 The defendants on the 4th day of December, 1944, filed an amended motion for a new trial and exhibits attached to and forming part of said amended motion for a new trial, which said motion and which said exhibits were in words and figures as follows, to-wit:

31 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division.

(Caption—No. 32,168)

AMENDED MOTION FOR NEW TRIAL.

Come now the defendants in the above-entitled cases by their undersigned attorneys and move this Court to grant a new trial therein. In support of this motion, it is shown that:

1. Shortly after the decision of the Supreme Court in these cases (reversing the judgment of the Court of Appeals which set aside the convictions of the defendants herein on the ground that the indictment out of which the cases arose was invalid), defendants filed in the Supreme Court (as an exhibit to a motion for stay of mandate) a proposed motion for remand of these case to the Court

of Appeals so that it might, pursuant to Rule 2(3) of the Criminal Appeals Rules, remand these cases to this Court for the purpose of permitting defendants to file a motion for a new trial. On the basis of this motion the mandate of the Supreme Court was issued without prejudice to the Court of Appeals entertaining a motion for remand under Rule 2(3), and pursuant to such a motion that Court remanded these cases to this Court so that a motion for a new trial might be filed.

2. Motion for new trial pursuant to remand granted by the Circuit Court of Appeals was duly filed in this Court* and after filing of answer, reply, and briefs, and the hearing of argument, was denied by this Court by order entered December 31, 1943.*

3. Said motion alleged and defendants re-allege that:

Defendants through diligent endeavor have uncovered evidence not available or accessible to them at the time of the trial; which demonstrates conclusively that William Goldstein, a principal Government witness in the trial of these cases testified falsely on material matters to the prejudice of all of the defendants.

Goldstein's uncorroborated testimony was the sole basis upon which the Government improperly charged defendant Johnson with some \$470,000 of personal expenditures and was of vital importance to the Government's case against both Johnson and the other defendants. In addition, Goldstein's testimony as to Johnson's sole ownership of certain properties was relied upon by the Government to supply vital links in the chain of circumstantial evidence upon which it successfully supported in the Supreme Court the conclusion that various gambling houses owned and operated by the co-defendants constituted a single unified operation and that Johnson was the owner of all the houses. Goldstein's testimony was directly contradicted by Johnson. If believed by the jury,

* Original or photostat or certified copies of all evidence offered in support of said motion were by order of this Court filed with the Clerk of this Court. All of such documents are hereby incorporated herein by this reference.

* The printed record on appeal from the denial of defendants' motion for new trial is submitted herewith as Exhibit A and by this reference is made a part hereof as though fully set out herein.

Goldstein's testimony justified the jury in disregarding Johnson's testimony not only with respect to the specific matters testified to by each, but in all other respects. In addition, if the jury believed Goldstein's testimony (and it has been the Government's position in the Court of Appeals and in the Supreme Court that that assumption must be indulged) then the jury was at liberty to disregard the testimony of all other witnesses whose statements in any manner contradicted Goldstein's. Goldstein's testimony, therefore, was not merely material to the case but its effect upon the jury was incalculable, and, being false, was so prejudicial to the defendants that only by a new trial can they possibly obtain justice.

The evidence uncovered by defendants in addition to proving the perjury of a principal Government witness, establishes the truth of the defendant Johnson's testimony as to the ownership of various properties, the sole ownership of which in Johnson has been relied upon by the Government to support both of the theories upon which the Government obtained (and sustained) the convictions of the defendants. The newly discovered evidence not merely demonstrates that the Government's principal witness committed perjury as to material matters, but also proves the truth of Johnson's testimony.

The evidence in support of this motion, consisting of affidavits of responsible and disinterested persons and other material, if true in substance and in fact, as we respectfully represent that it is, proves that Goldstein committed perjury as to facts which were unquestionably material to the decision of these cases. From this evidence the conclusion is inescapable that Goldstein wilfully gave false testimony at the trial of these cases which was highly prejudicial to all of the defendants.

Conclusive proof that Goldstein wilfully and knowingly gave false testimony on material points in these cases first came into defendants' possession shortly after the Supreme Court of the United States handed down its decision of June 7, 1948. Defendant Johnson knew at the time it was given that Goldstein's testimony was deliberate perjury, but did not then have complete proof of such perjury. Defendants

immediately commenced (and have prosecuted vigorously since) an investigation of the subjects of Goldstein's testimony and eventually obtained certain affidavits which justified referring the matter to the Department of Justice for its investigation. In the summer of 1942 these affidavits were turned over to the United States Attorney for the Northern District of Illinois, whose statutory duty (28 U.S.C. 485) is to prosecute in his District all delinquents for crimes and offenses cognizable under the authority of the United States. He was requested to investigate the facts alleged in the affidavits and to take such steps as would be proper as the result of that investigation. No such investigation was made by the Government at that time. The Government pursuant to request made of the Attorney General by counsel for defendants on June 25, 1943, did undertake an investigation. The results of this investigation are disclosed in the affidavits and other exhibits filed by the Government in the Court of Appeals (see Part II, Appendix to brief in support of this motion). The facts uncovered by this investigation as disclosed by the Government to the Court of Appeals, strongly corroborate defendants' charge that Goldstein testified falsely at the trial of these cases.

In view of the foregoing, and particularly since there can be no doubt that material testimony given by a principal Government witness in this case was false; that without it the jury not only *might* but probably would have reached a different conclusion; that the defendants were taken by surprise when the false testimony was given, and were unable to meet it at the trial; and that proof of the falsity of the testimony was promptly called to the attention of the Government upon its being obtained by defendants; it is respectfully submitted that justice requires a new trial in these cases on the basis of defendants' newly discovered evidence of Goldstein's perjury.

4. This Court denied defendants' motion on the ground that defendants failed to prove that Goldstein had testified falsely at the original trial of these cases. The Circuit Court of Appeals affirmed this Court's denial of defendants' motion on the ground that, defendants' evidence having been found insufficient to prove Goldstein

committed perjury, the rule of *Larrison v. United States*, 24 F. 2d. 82, was inapplicable, and the question of false testimony being thus eliminated, this Court's rejection of all the evidence as being "merely cumulative" or "merely impeaching" was not error as a matter of law.

5. Defendants filed a petition for certiorari in the Supreme Court of the United States requesting review of the judgment of the Court of Appeals. While this petition was pending, the Solicitor General of the United States formally advised the Supreme Court that William Goldstein had procured and filed certain income tax returns on behalf of his son, Theodore Goldstein, indicating complete equitable ownership, as well as legal title, in Theodore Goldstein of the Albany Park Bank Building from the date of its purchase by William Goldstein. Defendants' request to the Supreme Court that copies of the Theodore Goldstein returns be filed and made available to them was denied on the ground that such returns were not a part of the record in the cause. Defendants thereupon filed a motion in the Supreme Court requesting that Court to defer action on the petition for certiorari until appropriate motion could be filed in the Circuit Court of Appeals to reopen the record in the case. This motion was granted by the Supreme Court and thereafter defendants filed in the Court of Appeals a motion to reopen the cause and for leave to file with this Court an amended motion for new trial, which motion was granted on the 16th day of November, 1944. A certified copy of the order granting the same was filed in the Office of the Clerk of this Court on the 28th day of November, 1944.* This Court on Thursday, November 30, on defendants' motion entered an order requiring the Government to file with the Clerk of this Court copies of the Theodore Goldstein returns which returns, now filed in the Office of the Clerk

* Filed herewith are Exhibit B, defendants' motion in the Circuit Court of Appeals to reopen proceedings on the motion for new trial which contains as exhibits the Solicitor General's notification to the Supreme Court concerning the Theodore Goldstein tax returns and defendants' motion for deferment of consideration of their petitions for certiorari; Exhibit B-1, consisting of the Government's answer to defendants' motion in the Court of Appeals; and Exhibit B-2, consisting of defendants' reply to the Government's answer to said motion.

of this Court, are by reference incorporated herein. For convenience of the Court, there are filed herewith as Exhibits C-1, 2, 3, 4, 5, 6 and 7, photostat copies of such returns supplied to defendants' counsel by the Department of Justice, pursuant to this Court's order.

35 The returns of Theodore Goldstein procured and filed by William Goldstein demonstrate not merely that William Goldstein testified falsely at the trial of these cases with respect to the purchase of the Albany Park Bank Building, but demonstrate as well that his affidavits filed by the Government in opposition to defendants' motion for remand of these cases in the Court of Appeals and again relied upon by the Government in this Court in opposition to defendants' motion for new trial, contain deliberately false statements by William Goldstein, as more particularly set forth in Paragraphs numbered 4, 5, 6, 7, and 8 appearing on pages 3, 4, 5, 6, 7 and ending on the third line of page 8 in defendants' "Motion to Reopen Proceedings on Defendants' Motion for New Trial" hereto attached and marked Exhibit B and by this reference made part hereof.

6. Attached hereto as Exhibit D is an affidavit of Edward Wait, which shows that the litigation referred to in the affidavit of Max Lidschen, relied upon by the Government, and accepted by this Court on defendants' motion for new trial as corroborating Goldstein and contradicting the affidavit of Frank T. Fowler (no. 53) submitted by the defendants, relates to transactions which had their inception and conclusion some four months or more after Fowler severed his connection with the Waukegan Post. Lidschen's affidavit filed by the Government proves the falsity of Goldstein's attempt by affidavit to rebut Fowler's sworn statement that certain bills owing to the Waukegan Post by the Bon Air were collected by Goldstein through Skidmore.

7. There are submitted herein and made a part hereof as Exhibits E-1 and E-2 an affidavit and lease of Frank Sampson, tenant of the Albany Park Bank Building, showing that after this Court's denial of defendants' motion for new trial, William Goldstein as agent for his son, Theodore Goldstein, and Theodore Goldstein as owner of the Albany Park Bank Building, entered into a lease agreement with Frank Sampson for a ten-year occupancy
36 of the Albany Park Bank Building.

Wherefore, in view of the fact that this Court denied defendants' motion for new trial and its denial was sustained by the Circuit Court of Appeals on the ground that defendants had failed to prove Goldstein testified falsely, and that these proceedings have been reopened on the Government's admission of the procuring and filing of tax returns by William Goldstein, signed and sworn to, of his son, Theodore Goldstein, which show not only that Goldstein testified falsely at the trial of these cases but, in addition, executed false and perjured affidavits submitted by the Government in opposition to defendants' motion for new trial and relied upon by this court in denying said motion, and in view of the fact that without Goldstein's false testimony, the jury *might* have reached a different result at the trial, it is respectfully prayed that this Court grant this amended motion for a new trial in order that defendants may have a fair trial according to law, without taint of fraud or false testimony.

(Sgd.) *William J. Dempsey,*
William J. Dempsey,
Attorney for Defendant,
William R. Johnson.

(Sgd.) *Harold R. Schradzke,*
Harold R. Schradzke,
Attorney for Defendants,
Jack Sommers, James A.
Hartigan, William P. Kel-
ly and Stuart Solomon
Brown.

(Sgd.) *Homer Cummings,*
Homer Cummings,
Attorney for Defendants,
William R. Johnson, Jack
Sommers, James A. Har-
tigan, William P. Kel-
ly and Stuart Solomon
Brown.

37 City of Washington, {
 District of Columbia, { ss:

William J. Dempsey, attorney for defendant William R. Johnson, being duly sworn, upon his oath, deposes and

says that he has read the foregoing amended motion for a new trial and that the facts stated therein are true; that the said motion is made in good faith and not for the purpose of delay; that in his opinion the said motion presents a meritorious basis requiring a new trial in these cases and that a new trial is necessary in the interest of justice.

(Sgd.) *William J. Dempsey,*
William J. Dempsey.

Subscribed and sworn to before me this 2nd day of December, 1944.

(Sgd.) *Joyce Williams,*
Notary Public.

County of Cook, }
State of Illinois } ss:

Harold R. Schradzke, attorney for defendants Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, being duly sworn upon his oath deposes and says that he has read the foregoing amended motion for a new trial and that the facts stated therein are true; that the said motion is made in good faith and not for any purpose of delay; that in his opinion the said motion presents a meritorious and proper basis requiring new trial in these cases and that a new trial is necessary in the interest of justice.

(Sgd.) *Harold R. Schradzke,*
Harold R. Schradzke.

Subscribed and sworn to before me this 4th day of December, 1944.

(Sgd.) *Martha Markel,*
Notary Public.

38. City of Washington, }
District of Columbia, } ss:

Homer Cummings, attorney for defendants William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, being duly sworn upon his oath, deposes and says that he has read the foregoing amended motion for a new trial and that the facts stated therein are true; that the said motion is made in good faith

and not for the purpose of delay; that in his opinion the said motion presents a meritorious basis requiring a new trial in these cases and that a new trial is necessary in the interest of justice.

(Sgd.) *Homer Cummings,*
Homer Cummings.

Subscribed and sworn to before me this 2nd day of December, 1944.

(Sgd.) *Joyce Williams,*
Notary Public.

39 • IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
• • (Caption—No. 32168 • •

**EXHIBITS ATTACHED TO AND FORMING PART OF
AMENDED MOTION FOR A NEW TRIAL.***

INDEX OF EXHIBITS.

Exhibit A—Transcript of record on appeal from the denial of Defendants' Motion for a New Trial.

Exhibit B—Defendants' Motion in the Circuit Court of Appeals to Reopen Proceedings on the Defendants' Motion for a New Trial.

Exhibit B-1—Government's Answer to Defendants' Motion to Reopen Proceedings on Motion for a New Trial.

Exhibit B-2—Defendants' Reply to Government's Answer to said Motion.

Exhibit C-1—Photostatic copy of United States Individual Income Tax Return for the year 1937 of Theodore Goldstein.

* The exhibits attached to and forming part of the Defendants' Amended Motion for a New Trial are filed in this folder rather than by binding the exhibits together, for the Court's convenience in referring to the said exhibits and so as not to destroy any portion of the said exhibits.

Exhibit C-2—Photostatic copy of United States Individual Income Tax Return for the year 1938 of Theodore Goldstein.

Exhibit C-3—Photostatic copy of United States Individual Income Tax Return for the year 1939 of Theodore Goldstein.

Exhibit C-4—Photostatic copy of United States Individual Income Tax Return for the year 1940 of Theodore Goldstein.

Exhibit C-5—Photostatic copy of United States Individual Income Tax Return for the year 1941 of Theodore Goldstein.

Exhibit C-6—Photostatic copy of United States Individual Income Tax Return for the year 1942 of Theodore Goldstein.

Exhibit C-7—Photostatic copy of United States Individual Income Tax Return for the year 1943 of Theodore Goldstein.

Exhibit D—Affidavit of Edward Wait.

Exhibit E-1—Affidavit of Frank Sampson.

Exhibit E-2—Lease dated January 3, 1944, between Theodore Goldstein and Hines Realty & Construction Co. (Frank Sampson). Letter dated July 13, 1944, from William Goldstein as duly authorized agent of Theodore Goldstein to Hines Realty & Construction Co., attention Mr. Frank Sampson, extending the said lease.

(EXHIBIT A, consisting of the Printed Record filed on March 7, 1944, in the United States Circuit Court of Appeals on the appeal from the Defendants' Original Motion for a New Trial, is not reprinted here.)

(EXHIBIT B, consisting of Defendants' Motion in the United States Circuit Court of Appeals to Reopen Proceedings on the Defendants' Motion for New Trial is not reprinted here.)

EXHIBIT B-1.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit

No. 7500.

United States of America,

Plaintiff,

vs.

William R. Johnson,

Defendant.

No. 7501.

United States of America,

Plaintiff.

vs.

Jack Sommers, James A. Hartigan, William P. Kelly
and Stuart Solomon Brown,

Defendants.

ANSWER TO DEFENDANTS' MOTION TO REOPEN
PROCEEDINGS ON MOTION FOR NEW TRIAL

This case is now before this Court for the fourth time. The defendants were convicted of income tax evasion in the District Court for the Northern District of Illinois on October 23, 1940. This Court reversed the convictions principally on the ground that the indictment was returned by an illegally constituted Grand Jury. The Supreme Court after granting certiorari sustained the convictions, reversed and remanded the cases to this Court. Defendants then filed a motion in this Court for remand of the cases to the District Court for consideration of a motion for new trial based on newly discovered evidence. The motion for remand was granted. The motion for new trial subsequently filed in the District Court was based upon the claim that William Goldstein, a Government witness,

had perjured himself at defendants' trial. The motion was denied by the District Court and the District Court's judgment was affirmed by this Court on appeal. Petition for a writ of certiorari was then filed in the Supreme Court. The day subsequent to the convening of the 1944 term of that Court, that is on October 3, 1944, the Government filed a supplemental memorandum in opposition, advising the Supreme Court of certain new facts not contained in the record. This memorandum was filed at defendants' request, although we did not consider that the facts disclosed should affect the result. On October 6, 1944, the defendants filed a motion in the Supreme Court seeking to postpone determination of their petition for certiorari until disposition was made by this Court of the motion now before it, which defendants represented to the Supreme Court they intended to file. The Supreme Court thereupon temporarily postponed action on the petition for certiorari until the filing and disposition of the present motion. This motion is in effect a motion for remand of the cases to the District Court pursuant to Rule 2(3) of the Criminal Appeals Rules (Following 18 U.S.C. 688).

As grounds for their motion defendants rely entirely upon the fact, disclosed in our supplemental memorandum in the Supreme Court, that Theodore Goldstein, William Goldstein's son, recently filed income tax returns reporting income from the Albany Park Bank Building, one of the investment properties as to which William Goldstein testified at the trial. This fact, defendants contend, demonstrates that William Goldstein committed perjury at defendants' trial. We submit that the facts do not support this conclusion and that a second remand of the cases is unwarranted.

Goldstein's trial testimony with respect to the Albany Park Bank Building consisted only of statements that he purchased the building at Johnson's request with money given to him by Johnson, that title was taken in the name of his son, Theodore Goldstein, and that a quitclaim deed to the property was subsequently delivered to Johnson.

The circumstances under which the returns were filed, as well as the amounts of tax and years involved, are reported in our supplemental memorandum which is made a part of and forms the sole basis for defendants' motion. This spring the Chicago office of the Bureau of Internal Revenue received an anonymous telephone call to the effect that no

one was paying income tax on the rent from the Albany Park Bank Building, supposedly being collected by William Goldstein as agent for his son. A zone Deputy Collector of Internal Revenue was instructed to investigate the matter and approached Goldstein, telling him his son was liable for income tax on the income from the building. Goldstein protested and in doing so reaffirmed his trial testimony, stating that his son was only the record title holder, not the actual owner, of the building. In addition, he reiterated a statement he made in an affidavit filed on defendants' motion for new trial—that title to the building had been placed in his son's name because Johnson had an idea of opening a bank in the building and did not want to disclose the identity of the owners to the people in the neighborhood. The agent was also informed that corporate returns respecting the property had been filed by the Albany Park Safe Deposit Vault Company for the years 1937, 1938 and 1939—another fact which Goldstein had stated by affidavit filed on defendants' motion for new trial. The Deputy Collector nevertheless insisted that Theodore Goldstein, as record title owner, was taxable on the income from the building. Goldstein protested but finally agreed to the filing of the returns, saying that he did so in order that the matter might be closed. Goldstein is reported also to have told the agent that he did not know who actually owned the building or whether the money given him to purchase it was Johnson's or Skidmore's. Neither statement is inconsistent with his trial testimony. The defendants are therefore in the position of urging that the filing of the returns by Theodore Goldstein proves that William Goldstein committed perjury at their trial when, as a matter of fact, their own motion, showing the circumstances under which the returns were filed strengthens, rather than weakens, the conclusion, once affirmed by this Court, that Goldstein did not testify falsely at defendants' trial.

The filing of the returns by Goldstein's son is of itself of no consequence. They were filed at the insistence of the Deputy Collector that Theodore Goldstein was liable for the tax as holder of the record title. The question whether Theodore Goldstein is or is not liable for the tax is one which may be the subject of future judicial determination, should Theodore Goldstein decide to follow the prescribed procedure, but that question has no relevancy here.

The facts now relied upon by defendants do not in any way tend to show that William Goldstein committed perjury at defendants' trial and add nothing to defendants' contrary contention once rejected by this court. The proceedings in these cases have already been in the courts for more than four years since the jury returned its verdict of conviction. The instant motion furnishes no valid reason for their further prolongation by action of this Court. The motion should therefore be denied.

Respectfully submitted,

Samuel O. Clark, Jr.,
Assistant Attorney General

J. Albert Woll,
United States Attorney

October 30, 1944.

EXHIBIT B-2.

**IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit**

No. 7500.

United States of America,

Plaintiff,

vs.

William R. Johnson,

Defendant.

No. 7501.

United States of America,

Plaintiff,

vs.

**Jack Sommers, James A. Hartigan, William P. Kelly
and Stuart Solomon Brown.**

Defendants.

REPLY TO GOVERNMENT'S ANSWER TO DEFENDANTS' MOTION TO REOPEN PROCEEDINGS.

The Government relies in its Answer to Defendants' Motion upon the fact that "this case is now before this Court for the fourth time" (Answer, p. 1) and "the proceedings in these cases have already been in the courts for

more than four years since the jury returned its verdict of conviction". (Answer, p. 5). The importance of speedy trials* and expeditious appellate consideration in criminal cases is unquestioned. We do not conceive, however, that this Court has ever placed speedy termination of litigation above justice to refuse consideration of the merits of any point properly raised in a criminal appeal. Certainly it would be contrary to the genius of our whole judicial system if, as the Government's motion for time in which to answer suggested, the courts are to substitute what is "expedient" for what is right. Sufficient answer to the Government's contention is that the Supreme Court, despite the fact that it had before it everything that the Government has presented here², took the opposite view in deferring consideration of the pending Petition for Certiorari.

Motion is not under Rule 2(3).—The Government apparently labors under a basic misconception concerning the nature and purpose of the instant Motion. We are not asking this Court for a remand pursuant to Rule 2(3) of the Criminal Appeals Rules, which is in effect an authorization to the District Court to entertain a motion for a new trial. On the contrary, we are requesting that the proceedings on the motion for new trial filed pursuant to this Court's Order of Remand of October 13, 1943, be reopened. As the Supreme Court has held (*Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267):

"If it appears that supervening facts require a retrial in the light of a changed situation, the appropriate action of the appellate court is to vacate the decree which has been entered and ~~revest the court below with jurisdiction of the cause to the end that~~ issues may be properly framed and the retrial had. Retrial of the motion for new trial is obviously required in the light of the Goldstein tax returns. These returns require a modification of the trial court's conclusion that the evidence offered by the Defendants on the motion for new trial—

"merely shows that in 1941 Ted Goldstein continued to act for whomsoever he represented, and adds nothing to what was before the jury" (R. 512).

* The Government may disagree on this as evidenced by its failure up to this date to bring Goldstein to trial on his perjury indictment returned in March, 1940.

² The Government's Answer in this Court is a patent paraphrase of the Solicitor General's "Supplemental Memorandum in Opposition". See Exhibit A of Defendants' Motion, pp. 11-14.

The returns demonstrate incontrovertibly that in 1941 and continuously from the date of its purchase by William Goldstein to the present Theodore Goldstein was acting and has acted for himself alone in all matters relative to the Albany Park Bank Building. They also demonstrate that in his actions in connection with the property William Goldstein was acting for his son, Theodore, and not for Johnson. It plainly cannot be contended that these returns add "nothing to what was before the jury."

The nature of the evidence relied upon requires its consideration in relation to the evidence earlier submitted on the motion for new trial. Consideration of all the evidence then submitted, together with the returns of Theodore Goldstein filed by his father, William Goldstein, is essential in order that the trial court may determine the perjury of the Government's witness and as well evaluate the degree to which the testimony and affidavits of that witness have imposed upon the trial court and prostituted the judicial process. For this reason Defendants seek to have the case on the earlier motion for new trial reopened in the court below.

The Answer of the Government does not purport to meet the basic ground of our Motion.—The Government does not deny that the returns filed by Goldstein on behalf of his son demonstrate the falsity of Goldstein's affidavit on the motion for new trial. Indeed, the Government carefully omits even to mention the affidavit of Goldstein that the rental moneys from this property were—

"being held by me until such time as I am released from the Internal Revenue Department which served me with a lien to hold all funds and property belonging to William R. Johnson. * * * Theodore W. Goldstein holds title to the building in trust" (R. 252-253).

Neither does the Government deny that the Goldstein returns are irreconcilable with Goldstein's trial testimony that he had purchased the property for Johnson and that a quit-claim deed had been delivered to Johnson by his son, Theodore³.

³ It should be noted that the Government in its purported paraphrase of Goldstein's trial testimony (Answer, p. 3) significantly omits Goldstein's testimony (R. 517-518)—

"I was requested by Mr. Johnson to go out there and purchase the building for him * * *." (Emphasis supplied)

The Government also ignores the trial court's statement (R. 512):

"Goldstein testified on the trial that he purchased the property for Johnson. * * *." (Emphasis supplied)

The Government does not deny that the application of Theodore Goldstein's personal exemption and the exemption personal to him as a member of the armed forces to reduce his tax liability on the rental income is an assertion under penal sanction of his unqualified ownership of such income. Nor does the Government deny that the taking of deductions for depreciation on the property against not only the rental income but income from other sources by Theodore Goldstein is an assertion under penal sanction of complete ownership of the property by him.

The Government's avoidance is irrelevant and without support.—The Government's Answer does not even attempt to reconcile the statements made in the returns with the testimony of Goldstein at the trial or with the affidavits of Goldstein on the motion for new trial. It seeks to divert attention from this fatal omission by elaborate attempt to show that alleged oral statements by Goldstein at the time of filing the returns were not inconsistent with his trial testimony (Answer, pp. 3-4).

The alleged "circumstances", including alleged oral statements by Goldstein at the time of the filing, upon which the Government so strongly relies and is so solicitous to reconcile with his earlier testimony are but mere unsupported allegations of hearsay by counsel. The necessity of proof in any matter in controversy, not admitted by the other side cannot be escaped through the device of a hearsay allegation in pleading.

The attempt of the Government to create the impression that the returns were filed as the result of duress on the part of a Government agent is absurd on its face. The alleged duress is relevant only if the Government is by implication asking this Court to regard the returns as false. Under this view Goldstein subjected himself to severe criminal penalty by aiding and counseling the filing of the returns knowing them to be false. In short, in order to avoid the conclusion by this Court from such returns that Goldstein testified falsely at the trial and in his affidavit on the motion for new trial, the Government now asks this court to hold that Goldstein suborned perjury on the part of his son in the making of the returns. But—if it were true—as Goldstein testified at the trial, that Johnson, not Theodore Goldstein, was the real party in interest in the property, and—if it were true—as Goldstein swore in his affidavit, that he was holding the rents under the lien for Johnson's taxes, then obviously no insistence by a tax collector could have compelled Goldstein to procure and

file false returns and so subject himself and his son to prosecution. For any demand for a tax accounting on the rents, however, insistent, could obviously have been met without contradiction on the part of the Government by his surrender of the rents as Johnson's pursuant to the alleged lien. The Government's whole argument, based as it is on hearsay allegation as to "circumstance", is without support in fact or foundation in reason.

Conclusion.

The Government does not even advert in its Answer to the irreconcilability of Goldstein's affidavit on the motion for new trial with the returns currently filed by him. Neither is Goldstein's testimony, both at the trial and by affidavit, that Theodore held merely the empty record title attempted to be reconciled with the unqualified assertion in the returns of complete beneficial ownership in Theodore from the date of purchase in July, 1937. Nor does the Government claim that the denial of the motion for new trial can be supported in the face of proof that Goldstein did testify falsely. The inescapable conclusion is that the defendants' conviction, the trial court's denial of the motion for new trial, and this Court's affirmance thereof alike rest upon a false and fraudulent record.

It is submitted that the judgment affirming the order denying motion for new trial and the order denying the new trial, should be vacated and the cause remanded, with directions that the parties be permitted to amend their pleadings on the motion for new trial, and for retrial of the issues thus presented.

Respectfully,

Homer Cummings,

Counsel for Defendants, William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly, and Stuart Solomon Brown.

William J. Dempsey,

Counsel for Defendant, William R. Johnson,

Harold R. Schradzke,

Counsel for Defendants, Jack Sommers, William P. Kelly, James A. Hartigan, and Stuart Solomon Brown.

DISTRICT OF COLUMBIA, ss:

I, Alice H. White, being duly sworn on oath depose and say that copy of the Government's "Answer to Defendants' Motion to Reopen Proceedings on Motion for New Trial" was received in the office of Homer Cummings, Attorney for Defendants, William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly, and Stuart Solomon Brown, at ten o'clock a.m. on the first day of November, 1944. I am employed in the office of Homer Cummings, Attorney for Defendants, William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly, and Stuart Solomon Brown, and I know of my own knowledge that copy of the Government's "Answer to Defendants' Motion to Reopen Proceedings on Motion for New Trial" was received via United States mails at ten o'clock a.m. on the morning of November 1, 1944.

Subscribed and sworn to before me this _____ day of November, 1944.

Notary Public, D.C.

DISTRICT OF COLUMBIA, ss:

I, Alice H. White, being duly sworn on oath depose and say that I deposited copy of Defendants' Reply to Government's Answer to Defendants' Motion to Reopen Proceedings in the United States Mails, with proper postage thereon and properly marked for air mail and special delivery, addressed to the Honorable J. Albert Wohl, United States Attorney, Federal Building, Chicago, Illinois, at 9:00 p.m. on the third day of November, 1944.

Subscribed and sworn to before me this _____ day of November, 1944.

Notary Public, D.C.

1937

DELINQUENT
UNITED STATE

Ex C-1

Page 1

INDIVIDUAL INCOME TAX RETURN

1937

Do not write in this space

(Auditor's Stamp)

3/2/68

Treasury Department (FORM 1040) Internal Revenue Service

FOR NET INCOMES FROM SALARIES, WAGES, INTEREST, AND
DIVIDENDS OF MORE THAN \$5,000, AND INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTSFor Calendar Year 1937 or Fiscal Year
beginning _____, 1937, and ended _____, 1938

File this return not later than the 15th day of the third month following the close of the taxable year

PRINT NAME AND ADDRESS PLAINLY (See Instructions B)

THEODORE GOLDSTEIN

415 ALDINE AVENUE

CHICAGO

(First office)

(Country)

ILL.

(State)

Do not use these spaces

File

Serial

Number

Check

(Creditor's Stamp)

Cash—Check—M. O.

First Payment

INCOME

1. Salaries and other compensation for personal services (from Schedule A) \$
2. Dividends from domestic and foreign corporations
3. Interest on bank deposits, notes, mortgages, etc.
4. Interest on corporation bonds
5. Taxable interest on Government obligations, etc. (from Schedule B)
6. Income (or loss) from partnerships, syndicates, pools, etc. (furnish name and address):
7. Income from fiduciaries (furnish name and address):

8. Rents and royalties (from Schedule C)
9. Income (or loss) from business or profession (from Schedule D)
10. Gain (or loss) from sale or exchange of property (from Schedule F)
11. Other income (state nature; use separate schedule if necessary)
12. Total income in items 1 to 11 (enter nontaxable income in Schedule F)

DEDUCTIONS

13. Contributions (explain in Schedule G)
14. Interest (explain in Schedule G)
15. Taxes (explain in Schedule G)
16. Losses by fire, storm, etc. (explain in Schedule G)
17. Bad debts (explain in Schedule G)
18. Other deductions authorized by law (explain in Schedule G)
19. Total deductions in items 13 to 18
20. Net income (item 12 minus item 19)

COMPUTATION OF TAX

21. Net income (item 20 above)	\$ 1046 80	28. Normal tax (4% of item 27)	\$ — 0 —
22. Less: Personal exemption (from Schedule I)	1000 —	29. Surtax on item 24 (see Instruction 29)	
23. Credit for dependents (from Schedule I)	1000 —	30. Total tax (item 28 plus item 29)	\$ — 0 —
24. Balance (surtax net income)	\$ 46 80	31. Less: Income tax paid at source	
25. Less: Interest on Government obligations (item 5)	\$ —	32. Income tax paid to a foreign country or U. S. possession	
26. Earned income credit (from Schedule J)	104 68	33. Balance of tax (item 30 minus items 31 and 32)	\$ 141 12
27. Balance subject to normal tax	\$ — 0 —		

NOTE—One form marked "COPY" must be filed with this original return (25 will be

Schedule F—GAINS AND

LOSSES FROM SALES OR EXCHANGES OF

PROPERTY. (See Instruction 10)

Page 2

Line No.	1. Date Acquired Mo. Day Year	2. Date Sold or Exchanged Mo. Day Year	3. Time Held (Years, Months)	4. Gross Sales Price (Contract Price)	5. Cost or Other Basis	6. Expenses of Sale and Cost of Improvements Subsequent to Acquisition to March 1, 1913	7. Depreciation Allowed (or Allowable) Since Acquisition to March 1, 1913 (Furnish details)	8. Gain or Loss
(1)								
(2)								
(3)								
(4)								
(5)								
(6)								
(7)								
(8)								
(9)								
(10)								
(11)								
(12)								
(13)								
(14)								
(15)								
(16)								
(17)								
(18)								
(19)								
(20)								

Combine amounts in column 9 by groups according to time held, into totals; and enter same on line (w) of the summary table below. Indicate by G or L whether each entry is gain or loss.

Period of Time Held	1 Year or Less	Over 1 Year But Not Over 3 Years	Over 3 Years But Not Over 5 Years	Over 5 Years But Not Over 10 Years	Over 10 Years	ITEM 10 Enter Below Net Capital Gain or Loss Or Indicate by "G" or "L" the Nature of the Item on Line 9
(a) Total gain or loss from column 9 above						
(b) Percentage applicable	100%	80%	60%	40%	30%	
(c) Gain or loss applicable (See (w) times line (a))						

Enter item (a) as item 10 on page 1; but if item (a) is a net loss, do not enter over \$2,000.

Give here descriptive details not shown above:

State here whether any item above was (1) acquired other than by purchase, or (2) was transferred to purchaser having relationship to you:

Schedule G—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 16, 17, AND 18

Page 4

Schedule H—NONTAXABLE INCOME

OTHER THAN INTEREST REPORTED IN 3C

JULIE B. (See Instruction 11)

1. Source of Income

2. Nature of Income

3. Amount

Schedule I—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(a) Personal Exemptions

(b) Credits for Dependents

Status	Number of Months During Year in Each Status	Credits Claimed	Name of Dependent and Relationship	Number of Months During the Year		Credits Claimed
				Under 18 Years Old	Over 18 Years Old	
Single, or married and not living with husband or wife.	12	\$1000				
Married and living with husband or wife.						
Head of family (explain below)						
Reason for credit: Name of dependent and relationship			Reason for support if 18 years old or over			

Schedule J—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 26)

(a) For Net Income of \$3,000, or Less

(b) For Net Income in Excess of \$3,000

1. Net income (item 20, page 1)	\$ 1046	2. Earned income credit (10% of line 1, above)	\$ 104
3. Earned net income (Not over \$14,000)	\$	4. Net income (item 20, page 1)	\$
5. Earned income credit (10% of line 1 or 2, above, whichever amount is smaller, but do not enter less than \$300)	\$		

QUESTIONS

1. State your principal occupation or profession STUDENT
2. Check whether you are a citizen ☒ or resident alien ☐
3. If you filed a return for the preceding year, to which Collector's office was it sent? NO INCOME
4. Are items of income or deductions of both husband and wife included in this return? (See Instruction B)
5. State name of husband or wife if a separate return was made and the Collector's office to which it was sent
6. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a domestic or foreign personal holding company? (Answer "yes" or "no") NO If answer "yes", attach schedule required by Instruction M.

AFFIDAVIT. (See Instruction F)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Acts of 1936 and 1937 and the regulations issued thereunder.

Subscribed and sworn to by Julie B. [Signature]
before me this 12 day of June, 1937

[Signature]
(Signature and title of officer administering oath)

A return made by an agent must be accompanied by power of attorney. (See Instruction F.)

[Signature]
(Signature) (See Instruction F)

5. If this is a joint return (not made by agent) it must be signed by both husband and wife and sworn to before a proper officer of the office preparing the return, or if neither or both proper officers are present, then by both spouses.

AFFIDAVIT. (See Instruction F)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income-tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day,
of _____, 1937



(Signature and title of officer administering oath)

(Signature of person preparing the return)

(Signature of person preparing the return)

(Place of firm or employer, if any)

Treasury Department

DELINQUENT

FORM 1040

UNITED STATES

Internal Revenue

Ex C-2

938

INDIVIDUAL INCOME TAX RETURN 1938

(Auditor's Stamp)

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1938

or fiscal year beginning _____, 1938, and ended _____, 1939

(Before Preparing This Return, Read the Instructions Carefully)

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third
month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY (See Instructions B)

THEODORE GOLDSTEIN

(If a joint return of both husband and wife, it is a joint return)

415 ALDINE AVENUE

(Street and number, or rural route)

CHICAGO

(Post office)

(County)

(State)

(Do not use these spaces)

File

Date

Serial

No.

District

(Cashier's Stamp)

Cash—Check—M. O.

First Payment

INCOME

Salaries and other compensation for personal services. (From Schedule A)

Dividend

Interest on bank deposits, notes, mortgages, etc.

Interest on corporation bonds

Taxable interest on Government obligations, etc. (From Schedule B)

Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses).
(Furnish names and addresses)

Income from fiduciaries. (Furnish names and addresses)

Rents and royalties. (From Schedule C)

Income (or loss) from business or profession. (From Schedule D)

(a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)

(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)

(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From
Schedule G)

Other income (including income from annuities). (State nature; use separate schedule if necessary)

Total income in items 1 to 11. (Enter net taxable income in Schedule I)

DEDUCTIONS

Contributions paid. (Exempt to Schedule H)

Interest. (Exempt to Schedule H)

Taxes. (Exempt to Schedule H)

Losses from fire, storm, shipwreck, or other casualty, or theft. (Exempt to Schedule H)

Bad debts. (Exempt to Schedule H)

Other deductions authorized by law. (Exempt to Schedule H)

Total deductions in items 13 to 18

Net income (item 12 minus item 19)

COMPUTATION OF TAX

Net income (item 20 above)

Less: Personal exemption.

(From Schedule J-1)

Credit for dependents.

(From Schedule J-2)

Balance (surplus net income)

Less: Interest on Government obligations, etc. (See Instructions 28)

Earned income credit.

(From Schedule K-1 or K-2)

Balance subject to normal tax

If—Our form marked "DUPLICATE COPY" is not filed

28. Normal tax (4% of item 27)

29. Surtax on item 24. (See Instructions 29)

30. Total (item 28 plus item 29)

31. Total tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F)

32. Less: Income tax paid at

33. SOURCE: Income tax paid to a foreign country or U.S. possession. (Attach Form 1116)

be assessed if duplicate copy is not filed

9-3776

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Page 1

Schedule M.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 12, 14, 15, 16, 17, AND 18

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction 12)

1. Source of income	2. Nature of income	3. Amount
		\$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 20 AND 21. (See Instructions 20 and 21)

(1) Personal Exemption			(2) Credit for Dependents		
Status	Number of persons during the year in each status	Credits claimed	Name of dependent and relationship	Number of months during the year	Credits claimed
				Under 18 years old	Over 18 years old
Single, or married and not living with husband or wife.	12	\$100.00			
Married and living with husband or wife.					
Head of family (explain below).					
Reason for support if over 18 years old					

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 20)

(1) If your net income is \$3,000 or less, use only this part of schedule	(2) If your net income is more than \$3,000, use only this part of schedule
Net income (item 20, page 1)	Earned net income (not more than \$14,000)
Earned income credit (10% of net income, above)	Net income (item 20, page 1)
	Earned income credit (10% of earned net income or net income, above, whichever amount is smaller, but do not enter less than \$300)

QUESTIONS

- State your principal occupation or profession Student
- Check whether you are a citizen ☒ or a resident alien ☐
- If you filed a return for the preceding year, to which Collector's office was it sent? 100-500
- Are items of income or deductions of both husband and wife included in this return? (See Instruction A) Yes
- State name of husband or wife if a separate return was made; personal exemption, if any, claimed thereon; and the Collector's office to which it was sent
6. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 402? (Answer "yes" or "no") (If answer is "yes," attach schedule required by Instruction M.) no

AFFIDAVIT. (See Instruction F)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Act of 1936 and the regulations issued under authority thereof.

Subscribed and sworn to by Therese E. Lattin

before me this 15 day of July, 1936

A return made by an agent must be accompanied by power of attorney. (See Instruction F.)

Therese E. Lattin
(Signature) (See Instruction F)

AFFIDAVIT. (See Instruction F)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 15 day of July, 1936

(Signature and title of officer who)



U. S. GOVERNMENT PRINTING OFFICE

9-17706

(Signature of person preparing the return)

(Signature of person preparing the return)

(Place of firm or employer, if any)

FORM 1040
January Department
Internal Revenue Service

DELINQUENT
UNITED STATES

INDIVIDUAL INCOME TAX RETURN

Ex. C-3

Page 1

39

(Auditor's Stamp)

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1939

or fiscal year beginning _____, 1939, and ended _____, 1940

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third
month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instructions C)

THEODORE GOLDSTEIN

415 ALDINE AVENUE

CHICAGO

ILL.

(Do not use these spaces)

File

Card

Serial

No.

Checks

(Cashier's Stamp)

Cash—Check—M. O.

Pay to Payment

INCOME

Salaries and other compensation for personal services. (From Schedule A)

Dividends

Interest on bank deposits, notes, mortgages, etc.

Interest on corporation bonds

Taxable interest on Government obligations, etc. (From Schedule B)

Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses).

(Provide names and addresses)

Income from fiduciaries. (Provide names and addresses)

Rents and royalties. (From Schedule C)

1055

1115 60

Income (or loss) from business or profession. (From Schedule D)

(a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)

(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)

(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)

Other income (including income from annuities) (State source)

Total income in items 1 to 11. (Enter net taxable income in Schedule E)

1055

1115 60

DEDUCTIONS

Contributions paid. (Schedule in Schedule H)

Interest. (Schedule in Schedule H)

Taxes. (Schedule in Schedule H)

Losses from fire, storm, shipwreck, or other casualty, or theft. (Schedule in Schedule H)

Bad debts. (Schedule in Schedule H)

Other deductions authorized by law. (Schedule in Schedule H)

Total deductions in items 13 to 18

Net income (Item 12 minus item 19)

1115 60

COMPUTATION OF TAX

Net income (Item 20 above)

Less: Personal exemption.

(From Schedule J-1)

Credit for dependents.

(From Schedule J-2)

Balance (surplus net income)

Less: Interest on Government obligations, etc. (See Instructions 20)

Normal income credit.

(From Schedule K-1 or K-2)

Balance subject to normal tax

28. Normal tax (4% of item 27)

29. Surtax on item 28. (See Instructions 29)

30. Total (Item 28 plus item 29)

31. Total tax (Item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F)

32. Less: Income tax paid at source

Income tax paid to a foreign country or U.S. possession (Schedule F-1)

33. Balance of tax (Item 31 minus item 32 and 33)

34. Balance of tax (Item 31 minus item 32 and 33)

1115 60

NOTE—One form marked "DUPLICATE"

will be accepted if duplicate copy is not filed

Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See instruction 1)

1. Name and address of employer and nature of business	2. Amount	3. Expenses (deduct)	4. Amount

Total of column 2 minus total of column 4 (enter on item 1, page 1)

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See instruction 1)

1. Obligation or certificate	2. Amount owned at end of year including year beginning (except share of such obligations held by estate, trust, partnership, or common trust fund)	3. Interest received or accrued during the year	4. Interest exempt from taxation	5. Interest on certain types of bonds
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions.			All	
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended.			All	
(c) Obligations of United States issued on or before September 1, 1917.			All	
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness.			All	
(e) United States Savings Bonds and Treasury Bonds.			All	
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above).			None	
(g) Total (enter in item 3, page 1)				

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See instruction 5)

1. Kind of property	2. Amount	3. Depreciation (explain in Schedule E)	4. Repairs (explain below)	5. Other expenses (explain below)	6. Net profit (show in item 6 of column 1, page 1) (enter on item 6, page 1)
1 Store Brick 3424 Lawrence Ave.	1350 -	1000 -		1465 60	1115

Explanation of deductions claimed in columns 4 and 5 R. E. T. of 1465.60

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See instruction 9)

(State business name and address if different from name and address on page 1)			
1. Total receipts (state nature of business or profession)			
COST OF GOODS SOLD			
2. Labor		OTHER BUSINESS DEDUCTIONS	
3. Material and supplies		10. Salaries not included as "Labor" (do not deduct compensation for yourself)	
4. May handles bought for sale		11. Interest on business indebtedness	
5. Other costs (explain below)		12. Taxes on business and business property	
6. Plus inventory at beginning of year		13. Losses (explain below)	
7. Total (lines 2 to 6)		14. Bad debts arising from sales or services	
8. Less inventory at end of year		15. Depreciation, obsolescence, and depletion (explain in Schedule E)	
9. Net cost of goods sold (line 7 minus line 8)		16. Rent, repairs, and other expenses (explain below or on separate sheet)	
If the production, manufacture, purchase and sale of merchandise is an income-producing factor, inventories are required. Enter "C," "U," or "M," on lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		17. Total (lines 10 to 16)	
Explanation of deductions claimed in lines 5, 13, and 16		18. Total deductions (line 9 plus line 17)	
		19. Net profit (or loss) (line 1 minus line 18) (enter on item 9, page 1)	

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis	4. Assets fully depreciated in use at end of year	5. Depreciation claimed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowed for year
1 Store Brick 3424 Lawrence Ave.	7/37	50000 -		1500 -	48500 -	50	47 1/2	1000

ITAL ASSETS. (See instruction 10)

Page 2

any of the above names were acquired by you other than by purchase, explain fully how acquired:

Schedule H—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

1. Item No.	2. Explanation	3. Amount	4. Step No. (Continued)	5. Explanation (Continued)	6. Amount

Schedule I—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE H. (See Instruction U)

1. Source of Income	2. Nature of Income	3. Amount

Schedule J—EXPLANATION OF CREDITS CLAIMED IN ITEMS 23 AND 24. (See Instructions 23 and 24)

(1) Personal Exemption

(2) Credit for Dependents

Status	Number of credits claimed in year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year		Credit claimed
				Under 18 years old	Over 18 years old	
Single, or married and not living with husband or wife	12	\$ 1000 -				
Married and living with husband or wife						
Head of family (explain below)						

Reason for support if over 18 years old

Schedule K—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 26)

(1) If your net income is \$5,000 or less, use only this part of schedule

(2) If your net income is more than \$5,000, use only this part of schedule

Net income (Item 20, page 1)	\$	Earned net income (not more than \$14,000)	\$
Earned income credit (10% of net income, above)		Net income (item 20, page 1)	
		Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)	

QUESTIONS

- State your principal occupation or profession Student
- Check whether you are a citizen ☒ or a resident alien ☐
- If you filed a return for the preceding year, to which Collector's office was it sent? 1st Dist.
- Are items of income or deductions of both husband and wife included in this return?
- State (a) Name of husband or wife if separate return was made (b) Personal exemption, if any, claimed thereon (c) Collector's office to which it was sent
- Check whether this return was prepared on the cash ☐ accrual ☐ basis.
- Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a partnership company as defined by section 501? (Answer "yes" or "no") no (If answer is "yes," attach statement required by Instruction J.)

AFFIDAVIT. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith for the taxable year stated, pursuant to the Internal Revenue Code, as amended, and the regulations issued under authority thereof.

Subscribed and sworn to by Charles H. Heston
before me this 12 day of July, 1947
Charles H. Heston
A return made by an agent must be accompanied by power of attorney. (See Instruction E.)

(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a notary public by the agent preparing the return. If neither a husband nor wife is the agent, it must be sworn to by both agents.)

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day of _____, 1947



(Signature and title of officer administering oath)

(Signature of person preparing the return)

(Signature of person preparing the return)

(Place of firm or signature, if any)

FORM 1040
Treasury Department
Individual Income Tax**DELINQUENT UNITED STATES DELINQUENT**
INDIVIDUAL INCOME AND DEFENSE TAX RETURN

Ex. C-4

Page 1
1940

(Auditor's Stamp)

FOR GROSS INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1940

or fiscal year beginning 1940, and ended 1941

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third
month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instructions C)

THEODORE W. GOLDSTEIN

(Please) (See gross income of both husband and wife, if this is a joint return)

415 Aldine Ave.

(Street and number, or rural route)

Chicago

Ill

(Post office)

(County)

(State)

(Do not use these spaces)

File

No.

Serial

Date

District

Division

Office

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Cash—Check—M. O.

First Payment

INCOME

1. Salaries and other compensation for personal services. (From Schedule A) \$ 8600
2. Dividends
3. Interest on bank deposits, notes, mortgages, etc.
4. Interest on corporation bonds
5. Taxable interest on Government obligations, etc. (From Schedule B)
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses). (Provide names and addresses)
7. Income from scholarships. (Provide names and addresses)
8. Rents and royalties. (From Schedule C)
9. Income (or loss) from business or profession. (From Schedule D)
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)
- (b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)
- (c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)
11. Other income (including income from annuities). (State source)
- Total income in items 1 to 11. (State taxable income in Schedule B) \$ 968 98

DEDUCTIONS

12. Contributions paid. (Schedule to Schedule B)
13. Interest. (Schedule to Schedule B)
14. Taxes. (Schedule to Schedule B)
15. Losses from fire, storm, shipwreck, or other casualty, or theft. (Schedule to Schedule B)
16. Bad debts. (Schedule to Schedule B)
17. Other deductions authorized by law. (Schedule to Schedule B)
- Total deductions in items 12 to 16. - 0 -
- Net income (item 12 minus item 17) \$ 968 98

COMPUTATION OF TAX

- | | |
|---|---|
| 18. Normal tax (4% of item 27) \$ - 0 - | 28. Normal tax (4% of item 27) \$ - 0 - |
| 19. Surtax on item 24. (See Instructions F) | 29. Surtax on item 24. (See Instructions F) |
| 20. Total (item 28 plus item 29) | 30. Total (item 28 plus item 29) |
| 21. Total income tax (item 20, or if you had a net long-term capital gain or loss, enter line 16, Schedule F) | 31. Total income tax (item 20, or if you had a net long-term capital gain or loss, enter line 16, Schedule F) |
| 22. Less: Income tax paid as shown | 32. Less: Income tax paid as shown |
| 23. Income tax paid to a foreign country or U. S. possession. (Attach Form 1118) | 33. Income tax paid to a foreign country or U. S. possession. (Attach Form 1118) |
| 24. Balance of income tax (item 21 minus item 22 and 23) | 34. Balance of income tax (item 21 minus item 22 and 23) |
| 25. Defense tax (10% of item 31). (See Instructions H) | 35. Defense tax (10% of item 31). (See Instructions H) |
| 26. Total income and defense taxes due \$ - 0 - | 36. Total income and defense taxes due (item 24 plus item 25) \$ - 0 - |

NOTE.—A refund due this return may be accepted as meeting the requirements of the Internal Revenue Code, the law called for funds must be not both FULLY and EXACTLY.

10-10718

1. Name and address of employer—If a governmental unit, indicate

1. Name and address of employer (or, if self-employed, name and address)	2. Amount	3. Expense (Detailed)	4. Amount
Total of column 2 minus total of column 4 (enter on line 1, page 1)			

1. Collection of samples

1. Obligations or securities	2. Amount owned at end of year including prior year obligations held by estate, trust, partnership, or common trust funds	3. Interest received or accrued during the year	4. Amount of principal reduction or other charges during the year	5. Interest or other income of origin
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions			All	0000000000
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	0000000000
(c) Obligations of United States issued on or before September 1, 1917			All	0000000000
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	0000000000
(e) United States Savings Bonds and Treasury Bonds			All	0000000000
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above)			\$5,000	0
(g) Total (enter as item 5, page 1):			None	0

9. Kind of geometry

1. Kind of property	2. Amount	3. Depreciation (method or schedule)	4. Expense (method below)	5. Other expenses (method below)	6. Net profit (include loss of confidence 1.0%) (enter on line 7, page 2)
1 Story Brick 3424 Lawrence Ave	\$ 900	-	\$ 1000	-	\$ 1531
					08
					1631

Explanation of deductions claimed in columns 4 and 5 R.E. Tax 1531.00

State (1) nature of business

and address if different from name and address on pass:

 $\mathcal{L}(T)$ number of places of tangency

• **Online**

1. Total receipts

COST OF GOODS SOLD

(To be used where inventories are an income-determining factor)

2. Inventory at beginning of year
3. Merchandise bought for sale
4. Labor
5. Material and supplies
6. Other costs (stems below)
7. Total of lines 2 to 6
8. Less inventory at end of year
9. Net cost of goods sold (line 7 minus line 8)
10. Gross profit (line 1 minus line 9)

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself)
12. Interest on business indebtedness
13. Taxes on business and business property
14. Losses (explain below)
15. Bad debts arising from sales of services
16. Depreciation, obsolescence, and depletion (explain in Schedule E)
17. Rent, repairs, and other expenses (state below or on separate sheet)
18. Total of lines 11 to 17
19. Net profit (or loss) (line 1 minus lines 9 and 18) (enter as item 9, page 11)

If the production, manufacture, purchase and sale of merchandise is an income-producing factor, inventories are required. Enter "C" or "M" as instructed and indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed in lines 6, 14, and 17

1. Kind of property

1. Kind of property (If building, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include loans or other nonexcludable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life in years, assuming depreciation	8. Estimated recovery of the basis beginning of year	9. Depreciable value at the end of year
1 Story Brick 3424 Lawrence	7-37	\$50000 -	-	\$2500 -	\$46500 -	50	465	\$1000 -

Schedule F—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See instruction 10)

Page 2

1. Kind of property (If security, attach statement of ownership daily not above below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Cost or other basis (amount paid)	5. Gain or loss (Enter in line 5, column 3, of summary below)	6. Expenses of sale and cost of new investments substituted for those sold or exchanged on or after 1-1-1913 (See instruction 10)	7. Depreciation allowed (for other than real estate) under provisions of Section 179 (See instruction 10)	8. Gain or loss (columns 5 plus columns 6 and 7, minus column 8)	9. Gain or loss to be taken into account Mo. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 12 MONTHS								
			\$	\$	\$	\$	\$	100
			\$	\$	\$	\$	\$	100
			\$	\$	\$	\$	\$	100
			\$	\$	\$	\$	\$	100
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)								\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 12 MONTHS BUT NOT FOR MORE THAN 24 MONTHS

1. Kind of property (If security, attach statement of ownership daily not above below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Cost or other basis (amount paid)	5. Gain or loss (Enter in line 5, column 3, of summary below)	6. Expenses of sale and cost of new investments substituted for those sold or exchanged on or after 1-1-1913 (See instruction 10)	7. Depreciation allowed (for other than real estate) under provisions of Section 179 (See instruction 10)	8. Gain or loss (columns 5 plus columns 6 and 7, minus column 8)	9. Gain or loss to be taken into account Mo. Amount
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS								
			\$	\$	\$	\$	\$	66%
			\$	\$	\$	\$	\$	66%
			\$	\$	\$	\$	\$	66%
			\$	\$	\$	\$	\$	66%
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)								\$

SUMMARY OF CAPITAL NET GAINS OR LOSSES

1. Classification	2. Net short-term capital gain or loss (enter in line 10 (a), page 1, of summary below)	3. Net gain or loss to be taken into account from columns 9, above	4. Net gain or loss to be taken into account from partnerships and "common trust funds"	5. Total net gain or loss to be taken into account in columns 2, 3, and 4 of this summary
Total net short-term capital gain or loss (enter in line 10 (a), page 1, of summary below)	\$	Gain	Loss	Gain
Total net long-term capital gain or loss (enter in line 10 (b), page 1, of summary below)	\$	Gain	Loss	Gain
				Loss

COMPUTATION OF ALTERNATIVE TAX

Use only (1) if you had a net long-term capital gain, and item 24, page 1, exceeds \$22,000
 (2) if you had a net long-term capital loss, and such loss plus item 24, page 1, exceeds \$22,000

Net income (item 21, page 1). (See instruction 10)	\$	10. Normal tax (4% of line 9)	\$
(a) Net long-term capital gain (item 10 (a), page 1)	\$	11. Surtax on line 4. (See instruction 29)	\$
(b) Net long-term capital loss (item 10 (b), page 1)	\$	12. Partial tax (line 10 plus line 11)	\$
Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See instruction 10)	\$	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	\$
Less: Payments on account. (From Schedule J-1)	\$	(b) 30% of net long-term capital loss (30% of line 2 (b))	\$
Credit for dividends. (From Schedule J-2)	\$	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$
Income (before net income)	\$	15. Total normal tax and surtax (item 10, page 1)	\$
Less: Interest on Government obligations. (See instruction 29)	\$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter on line 21, page 1)	\$
Normal income credit. (From Schedule K-1 or K-2). (See last 10)	\$		
Amount subject to normal tax	\$		

Schedule G—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See instruction 10)

1. Kind of property	2. Date acquired	3. Cost or other basis (amount paid)	4. Cost or other basis	5. Proceeds of sale and cost of new investments substituted for those sold or exchanged on or after 1-1-1913	6. Depreciation allowed (for other than real estate) under provisions of Section 179 (See instruction 10)	7. Gain or loss (columns 5 plus columns 6 and 7, minus column 8)
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter on line 10 (a), page 1)						

See last 10, Schedule J, or last 10, Schedule K, for instructions on how to compute the tax on the gain or loss from the sale of property other than capital assets.

Subclass II.—EXPLANATION OF INDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

[illegible]

Schedule 1 - NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. See instructions. 0

[illegible]

Schedule J—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23.)

(C) Personal Strengths				(D) Credit for Dependents			
Name	Number of years during the year in each status	Credit allowed		Place of dependent and relationship	No. of months during year		Credit due
		Under 18 years old	Over 18 years old		Under 18 years old	Over 18 years old	
Single, or married and not living with husband or wife	0	535	33				
Married and living with husband or wife	6	644	66				
Head of family (explain below)							
				Reason for support if over 18 years old			

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See instruction 25)

<p>(1) If power not income is \$500 or less, use only this part of schedule.</p> <p>Net income (from 20, page 1) \$</p> <p>Earned income credit (10% of net income, above)</p>		<p>(2) If power not income is more than \$500, use only this part of schedule.</p> <p>Earned net income (not more than \$14,000) \$</p> <p>Net income (from 20, page 1)</p> <p>Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$200)</p>	
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QUESTIONS

1. State your principal occupation or profession. Attorney
2. Check whether you are a citizen ☒ or a resident alien ☐.
3. Did you file a return for any prior year? yes If so, what was the 1958 To which Collector's office was it sent? 105 111
4. Are items of income or deductions of both husband and wife included in this return? yes
5. State (a) Name of husband or wife if separate return was made
- (b) Personal exemption, if any, claimed thereon.
- (c) Collector's office to which it was sent.
6. Check whether this return was prepared on the cash ☒ accrual ☐ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a partnership company as defined by section 501 of the Internal Revenue Code? (Answer "yes" or "no") no (If answer is "yes," attach statement required by instruction 1.)

AFFIDAVIT. (See Instruction E)

I/We swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to by David W. G. Patton
before me this 29 day of September, 1944
David W. G. Patton not a deputy clerk
A return made by an agent must be accompanied by power of attorney. (See Instruction 12)
David W. G. Patton
(Signature) (See Instruction 12)
(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a notary public or other person giving the return. It either a joint return, either husband or wife must be a resident of the United States.)

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day,
of _____ 194____.

Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction C)

Page 1

1. Obligation or certificate	2. Amount received or paid of your obligation during the year (attach schedule)	3. Interest received or earned during the year	4. Amount of interest or dividend on obligation during the year	5. Interest or dividend on obligation during the year (attach schedule)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions			AL	00000000
(b) Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended			AL	00000000
(c) Obligations of United States bonds on or before September 1, 1917			AL	00000000
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness issued prior to March 1, 1941			AL	00000000
(e) United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941			AL	00000000
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above) issued prior to March 1, 1941			0.00	0
(g) Dividends on share accounts in Federal savings and loan associations			None	
(A) Total (enter as item 4 (g), page 1)				0
(b) Obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest as item 4 (b), page 1)		Amount paid at end of year	Interest received or earned during the year (attach schedule)	

Schedule B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction D)

1. Kind of property	2. Amount	3. Depreciation or depletion (attach schedule)	4. Expenses (attach schedule)	5. Other expenses (attach schedule)	6. Net profit (showing 1 step more of columns 2, 3, 4, and 5; enter as item 5, page 1)
1 Story Brick 3434 LAWRENCE AVE	\$ 28 875 -	\$ 1000 -		None	\$ (285)

Explanation of deductions claimed in columns 4 and 5:

Schedule C.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 11, 12, 13, 14, 15, AND 16

1. Item No.	2. Explanation	3. Amount	4. Item No. (Continued)	5. Explanation (Continued)	6. Amount (Continued)
	Contributions	\$ 50 -			

Schedule D.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 20 AND 21. (See Instructions 20 and 21)

(1) Personal Exemption			(2) Credit for Dependents		
Status	Number of months during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year	Credit claimed
	Under 18 years old	18 years or over		Under 18 years old	18 years or over
Single or married and not living with husband or wife, and not head of family	11	\$ 1575 -			
Married and living with husband or wife	1	62 50			
Head of family (explain below)					

Reason for support if 18 years or over:

Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 20)

(1) If your net income is \$5,000 or less, use only this part of schedule		(2) If your net income is more than \$5,000, use only this part of schedule	
Net income (item 16, page 1)	\$ 2225 -	Earned net income (not more than \$14,000)	0
Earned income credit (10% of net income, above)	222 50	Net income (item 16, page 1)	
		Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$200)	

1. State your principal occupation or profession **Attorney**
2. Name and address of employer
3. Did you file a return for any prior year? **Yes** If so, what was the latest year? **1940** To which Collector's office was it sent? **1st III**
4. If separate return was made for the current year, state:
(a) Name of husband or wife
(b) Personal exemption, if any, claimed thereon
(c) Collector's office to which it was sent
5. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
6. If return on cash basis, do you elect, under section 45, to include as income

QUESTIONS

- received in the current year the income for current and prior years in the redemption of noninterest-bearing obligations issued at a discount? If so, attach statement listing obligations covered in computation of the accrued income. Report such income as item 3 or 4, page 1, whichever applicable.
7. Did you receive during the taxable year any nonexempt income after the interest reported in Schedule A (see Instruction C)? If so, attach schedule showing source, nature, and amount of such income.
8. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? If so, attach statement required by Instruction J.

DETACH PAGES 3 AND 4 IF NOT USED

Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 7)

Page 2

1. Kind of property (If security, attach statement of description; details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (including points)	5. Cost or other basis	6. Expenses of sale and cost of improvements attributable to capital gain or loss (See instructions 1, 191)	7. Depreciation allowed for other assets (See instructions 1, 191) (Carry over from Schedule D)	8. Gain or loss (shown as plus or minus; if minus, show amount and sign)	9. For each year	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 12 MONTHS									
			\$	\$	\$	\$	\$	100	\$
			\$	\$	\$	\$	\$	100	\$
			\$	\$	\$	\$	\$	100	\$
			\$	\$	\$	\$	\$	100	\$
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 12 MONTHS BUT NOT FOR MORE THAN 36 MONTHS

1. Kind of property (If security, attach statement of description; details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (including points)	5. Cost or other basis	6. Expenses of sale and cost of improvements attributable to capital gain or loss (See instructions 1, 191)	7. Depreciation allowed for other assets (See instructions 1, 191) (Carry over from Schedule D)	8. Gain or loss (shown as plus or minus; if minus, show amount and sign)	9. For each year	10. Amount
			\$	\$	\$	\$	\$	66%	\$
			\$	\$	\$	\$	\$	66%	\$
			\$	\$	\$	\$	\$	66%	\$
			\$	\$	\$	\$	\$	66%	\$
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 36 MONTHS

1. Kind of property (If security, attach statement of description; details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (including points)	5. Cost or other basis	6. Expenses of sale and cost of improvements attributable to capital gain or loss (See instructions 1, 191)	7. Depreciation allowed for other assets (See instructions 1, 191) (Carry over from Schedule D)	8. Gain or loss (shown as plus or minus; if minus, show amount and sign)	9. For each year	10. Amount
			\$	\$	\$	\$	\$	50	\$
			\$	\$	\$	\$	\$	50	\$
			\$	\$	\$	\$	\$	50	\$
			\$	\$	\$	\$	\$	50	\$
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									\$

SUMMARY OF NET CAPITAL GAINS OR LOSSES

1. Classification	2. Net short-term capital gain or loss (enter in column 3, of summary below)	3. Net gain or loss to be taken into account from column 10, above		4. Net gain or loss to be taken into account from column 10, above		5. Total net gain or loss to be taken into account in columns 2, 3, and 4 of this summary	
		Gain	Loss	Gain	Loss	Gain	Loss
1. Total net short-term capital gain or loss (enter on line 7 (a), page 1, amount of gain shown in column 3)	\$	\$	\$	\$	\$	\$	\$
2. Total net long-term capital gain or loss (enter on line 7 (b), page 1, amount of gain or loss shown in column 3)	\$	\$	\$	\$	\$	\$	\$

COMPUTATION OF ALTERNATIVE TAX

Use only: If you had a net long-term capital gain, and item 22, page 1, exceeds \$12,000, or
If you had a net long-term capital loss, and such loss plus item 22, page 1, exceeds \$12,000

1. Net income (line 18, page 1). (See instruction 7).	\$	10. Normal tax (14% of line 9)	\$
2. (a) Net long-term capital gain (line 7 (b), page 1).	\$	11. Surplus on line 9 (See instruction 27)	\$
(b) Net long-term capital loss (line 7 (b), page 1).	\$	12. Partial tax (line 10 plus line 11)	\$
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See instruction 7).	\$	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	\$
4. Less Personal exemption. (From Schedule D-1).	\$	(b) 30% of net long-term capital loss (30% of line 2 (b))	\$
5. Credit for dependents. (From Schedule D-2).	\$	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$
6. Balance (surplus not income).	\$	15. Total normal tax and surplus (line 12, page 1).	\$
7. Less: item 4 (a), page 1.	\$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter on line 20, page 1).	\$
8. Excess income credit. (From Schedule E-1 or E-2). (See last 7).	\$		
9. Balance subject to normal tax.	\$		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired Mo. Day Year	3. Gross sales price (including points)	4. Cost or other basis	5. Expenses of sale and cost of improvements attributable to capital gain or loss (See instructions 1, 191)	6. Depreciation allowed for other assets (See instructions 1, 191) (Carry over from Schedule D)	7. Gain or loss (shown as plus or minus; if minus, show amount and sign)
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter on line 7 (a), page 1)						

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items on this page.
If any of such items were acquired by you other than by purchase, explain fully how acquired.

Schedule M.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 2)

Page 1

State (1) nature of business

(2) number of places of business

(3) business unit

and address if different from name and address on page 1

1. Total receipts

COST OF GOODS SOLD

(To be used where inventories are an essential accounting factor)

2. Inventory at beginning of year

3. Merchandise bought for sale

4. Labor

5. Material and supplies

6. Other costs (itemize below)

7. Total of lines 2 to 6

8. Less inventory at end of year

9. Net cost of goods sold (line 7 minus line 8)

10. Gross profit (line 1 minus line 9)

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself)

12. Interest on business indebtedness

13. Taxes on business and business property

14. Losses (explain below)

15. Bad debts arising from sales or services

16. Depreciation, obsolescence, and depletion (explain in Schedule J)

17. Rent, repairs, and other expenses (itemize below or on separate sheet)

18. Total of lines 11 to 17

19. Total of lines 9 and 18

20. Net profit (or loss) (line 1 minus line 19) (enter on item 8, page 1)

If the production, manufacture, purchase, or sale of merchandise is an income-producing factor, inventories are required. Enter "Q" or "M" on lines 2 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed on lines 6, 14, and 17

Schedule L.—INCOME FROM PARTNERSHIPS, FIDUCIARIES, AND OTHER SOURCES

INCOME (OR LOSS) FROM PARTNERSHIPS, TRUSTS, ETC. (SEE INSTRUCTION 9 (a)) (GIVE NAME AND ADDRESS)

INCOME FROM FIDUCIARIES (GIVE NAME AND ADDRESS)

INCOME FROM OTHER SOURCES (STATE NATURE)

Total amounts in Schedule L. (Enter on item 9, page 1)

Schedule J. EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES F, G, AND H

1. Kind of property (If building, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in prior year at end of year	5. Depreciation allowed for allowable in prior years	6. Depreciation claimed on other lines to be increased	7. Estimated life used in computing depreciation	8. Estimated life from beginning of year	9. Depreciation allowable this year
1 Story Brick 3424 Lawrence	7-37	50000	-	3500	45500	50	45	1000

AFFIDAVIT. (See Instruction E.)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this

day

194



(Signature of person preparing the return)

(Signature of person preparing the return)

(Signature and title of officer administering oath)

(Place of business, if any)

FORM 1040
Treasury Department
Individual Income Tax Return

AMENDED
UNITED STATES
INDIVIDUAL INCOME TAX RETURN

Ex. C-6

Page 1
1942

OPTIONAL FORM 1040 MAY BE FILED INSTEAD OF THIS FORM IF GROSS INCOME IS REPORTED ON THE CASH BASIS FOR THE CALENDAR YEAR, IS NOT MORE THAN \$200,000, AND CONSISTS WHOLLY OF SALARY, WAGES, OTHER COMPENSATION FOR PERSONAL SERVICES, DIVIDENDS, INTEREST OR ANNUITIES.

FOR CALENDAR YEAR 1942

or fiscal year beginning 1942 and ending 1943

PRINT NAME AND ADDRESS PLAINLY. (See instruction C)

Theodore W. Goldstein

(Name) (The name of the individual and wife, if this is a joint return)

315 Aldine Ave.

(Street and number, or rural route)

Chicago

(Post office)

Ill

(County)

(State)

Sun Shipbuilding & Dry Dock Co.

(Social Security number, if any)

Chester, Penna.

(If more than one employer, attach statement showing name and address and amount received from each)

(Do not use these spaces)

File

Card

Serial

No.

Check

(Cashier's Stamp)

Cash—Check—M. O.

Post Payment

INCOME

Amount

Deductible Expenses

(Less certain expenses)

1. Salaries and other compensation for personal services, \$

2. Dividends

3. Interest on bank deposits, notes, etc.

4. Interest on corporation bonds, etc.

5. Interest on Government obligations, etc.:

(a) From line (A), Schedule A

(b) From line (F), Schedule A

6. Rents and royalties. (From Schedule B)

7. Annuities

ITEMS 8, 9, AND 10, BELOW (AND PAGES 2 AND 3) NEED NOT BE CONSIDERED UNLESS YOU HAVE INCOME (OR LOSSES) IN ADDITION TO ITEMS ABOVE.

8. (a) Net gain (or loss) from sale or exchange of capital assets. (From Schedule F)

(b) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)

9. Net profit (or loss) from business or profession. (From Schedule H)

(State total receipts, from line 1, Schedule H, \$)

10. Income (or loss) from partnerships; fiduciary income; and other income. (From Schedule I)

11. Total income in items 1 to 10

DEDUCTIONS

12. Contributions paid. (Explain in Schedule C)

13. Interest. (Explain in Schedule C)

14. Taxes. (Explain in Schedule C)

15. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule C)

16. Bad debts. (Explain in Schedule C)

17. Other deductions authorized by law. (Explain in Schedule C)

18. Total deductions in items 12 to 17

19. Net income (item 11 minus item 18)

COMPUTATION OF TAX

20. Net income (item 19 above)

21. Less: Personal exemption. (From Schedule D-1)

22. Credit for dependents. (From Schedule D-2)

23. Balance (surplus net income)

24. Less: Item 5 (a) above

25. Earned income credit. (From Schedule E-1 or E-2)

26. Balance subject to normal tax

27. Normal tax (6% of item 26)

28. Surplus on item 23. (See instruction a)

29. Total (item 27 plus item 28)

30. Total tax (from 29 or line 14, Schedule F)

31. Less: Income tax paid at source

32. Excess tax paid to a foreign country (Form 1116)

33. Balance of tax (from 30 minus items 31 and 32)

Use delivery under the provision of priority, that this return (including any accompanying schedules and attachments) has been examined by me/has and by the last of my/our knowledge and belief is a true, correct, and complete return. It must be signed by each individual named on this return. (See instruction 2)

Theodore W. Goldstein 9/23/44 *Charles H. Goldstein* 9/23/44

(Signature of taxpayer) (Signature of preparer)

(If this is a return made by an agent, attach a statement of authority. See instruction 2)

August

"I was in active service in the Army in 1942 and my recomputed tax for 1942 is zero."

Madeline A. Jackson

(a) Obligations of, or the U.S. Govt.									
(b) Obligations of U.S. Govt.									
(c) Obligations of United States issued on or before September 1, 1917									
(d) Treasury Notes issued prior to December 1, 1945, Treasury Bills and Treasury Certificates of Indebtedness issued prior to March 1, 1941								AS	
(e) United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941								AS	
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (d) above) issued prior to March 1, 1941								\$1,000	
(g) Dividends on share accounts in Federal savings and loan associations in case of shares issued prior to March 28, 1942								None	
(h) Total (enter on item 5 (a), page 1)									0.00

(f) Treasury Notes issued on or after December 1, 1945, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest on item 5 (b), page 1)

Amount paid at end of year: 0

Interest required or earned during the year (enter on item 5 (b), page 1): 0

Schedule B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 8)

1. Kind of property	2. Amount	3. Depreciation or depletion (attach schedule)	4. Expenses (attach schedule)	5. Other expenses (attach schedule)	6. Net profit (columns 2 minus sum of columns 3, 4, and 5) (enter on item 8, page 1)
1 Story Brick 5434 Lawrence Ave	3000	1000			2000

Explanation of deductions claimed on columns 4 and 5:

Schedule C.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 12, 13, 14, 15, 16, AND 17

1. Item No.	2. Explanation	3. Amount	4. Item No. (Continued)	5. Explanation (Continued)	6. Amount (Continued)

Schedule D.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 21 AND 22. (See Instructions 21 and 22)

(1) Personal Exemption

1. Status	2. Number of persons during the year in each status	3. Credit claimed	4. Name of dependent and relationship	5. Number of months during the year (Under 18 years old 18 years or over)	6. Credit claimed
Single, or married and not living with husband or wife, and not head of family	1	500			
Married living with husband or wife					
Head of family (see below)					

Reason for support if 18 years or over:

Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 23)

(1) If your own income is \$2,000 or less, use only this part of schedule	(2) If your net income is more than \$2,000, use only this part of schedule
Net income (item 19, page 1)	Earned net income (not more than \$14,000)
Earned income credit (10% of above)	Net income (item 19, page 1)
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)

QUESTIONS

- Did you file a return for any prior year? **YES** the latest year? **1941** To which Collector's office was sent? **1st 711**
- If separate return was made for the current year, state:
 - Name of husband or wife
 - Personal exemption, if any, claimed thereon
 - Collector's office to which it was sent
- Check whether this return was prepared on the cash ☒ or accrual ☐ basis
- Was the rate of your salary or wages increased or decreased after October 1, 1942, and before the end of your taxable year? (Yes or no) **NO**
- Did you receive during your taxable year any amount claimed to be taxable other than interest reported in Schedule A (see Instruction 14)? **NO** If so, attach schedule showing source, nature, and amount of such income.
- Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 204 of the Internal Revenue Code? **NO** If so, attach statement required by Instruction K.

DETACH PAGES 3 AND 4 IF NOT USED

Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See instructions 8) Page 3

1. Kind of property (If summary, state in column 2 of description details not shown below)	2. Date acquired	3. Date sold	4. Gross sales price (investment price)	5. Cost or other basis	6. Expenses of sale and cost of improvements (including short-term capital gain or loss on sale of property in Schedule 1, 1913) (Include in Schedule 2)	7. Dispositions allowed for alternative minimum tax purposes (See instructions 1, 1913) (Include in Schedule 2)	8. Gain or loss (column 4 plus column 6 minus column 5 and 7)	9. Enter in column 1, 2, and 3 of this summary	10. Amount
Mo. Day Year	Mo. Day Year								
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS									
									100
									100
									100
									100
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									0
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS									
									50
									50
									50
									50
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									0

SUMMARY OF CAPITAL GAINS AND LOSSES

1. Classification	2. Net short-term capital gain or loss (enter in column 3, of summary below)	3. Net gain or loss to be taken into account from column 10, above	4. Net gain or loss to be taken into account from partnerships and common trust funds	5. Total net gain or loss (enter in column 1, 2, and 3 of this summary)
	(a) Gain	(b) Loss	(a) Gain	(b) Loss
1. Total net short-term capital gain or loss	0	0	0	0
2. Total net long-term capital gain or loss	0	0	0	0
3. Net gain in column 5, lines 1 and 2. (Enter as item 8 (a), page 1)	0			
4. Net loss in column 5, lines 1 and 2. (The amount to be entered as item 8 (a), page 1, is (1) this item or (2) net income, computed without regard to capital gains or losses, or (\$31,000, whichever is smaller)	0			

COMPUTATION OF ALTERNATIVE TAX

Use only if you had an excess of net long-term capital gain over net short-term capital loss, and item 23, page 1, exceeds \$12,000

1. Net income (line 19, page 1)	0	10. Normal tax (6% of line 9)	0
2. Excess of net long-term capital gain over net short-term capital loss (line 2, column 3 (a), minus line 1, column 3 (b), of summary above)	0	11. Surtax on line 6. (See instruction 20)	0
3. Ordinary net income (line 1 minus line 2)	0	12. Partial tax (line 10 plus line 11)	0
4. Less: Personal exemptions. (From Schedule D-1)	0	13. 30% of line 2	0
5. Credit for dependents. (From Schedule D-2)	0	14. Alternative tax (line 12 plus line 13)	0
6. Balance (surtax not income)	0	15. Total normal tax and surtax (from page 1)	0
7. Less: Item 5 (a), page 1	0	16. Tax liability (line 14 or line 15, whichever is the lower)	0
8. Excess income credit. (From Schedule E-1 or E-2)	0		
9. Balance subject to normal tax	0		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See instructions 8)

1. Kind of property	2. Date acquired	3. Gross sales price (investment price)	4. Cost or other basis	5. Expenses of sale and cost of improvements (including short-term capital gain or loss on sale of property in Schedule 1, 1913)	6. Dispositions allowed for alternative minimum tax purposes (See instructions 1, 1913) (Include in Schedule 2)	7. Gain or loss (column 3 plus column 5 minus column 4 and 6)
Total net gain (or loss) (enter as item 8 (b), page 1)						

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items on this page. If any of such items were acquired by you other than by purchase, explain fully how acquired.

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FORM 1040
Treasury Department
Individual Income Tax Service

AMENDED UNITED STATES INDIVIDUAL INCOME AND VICTORY TAX RETURN

Ex. C-7

Page 1
1943

OPTIONAL FORM 1040A MAY BE FILED INSTEAD OF THIS FORM IF GROSS INCOME IS REPORTED ON THE CARD BASIS FOR THE CALENDAR YEAR, IS NOT MORE THAN \$2,000, AND CONSISTS WHOLLY OF SALARY, WAGES, OTHER COMPENSATION FOR PERSONAL SERVICES, DIVIDENDS, INTEREST OR ANNUITIES.

FOR CALENDAR YEAR 1943

or from year beginning 1943, and ending 1944

PRINT NAME AND ADDRESS PLAINLY. (See Instructions C.)

THEODORE W. GOLDSTEIN

(Please) (Use given names of both husband and wife, if this is a joint return)

615 Aldine Ave

Chicago

(Street and number, or rural route)

Ill

(City or town)

(State)

Member of Armed Forces AAF-4357-24144 HUNT LG

Occupation AAF-4357-24144 Social Security number, 64-111-104-104

(Do not use these spaces)

File
(date)
Serial
No.
District
(Cashier's Stamp)

COMPUTATION OF NET INCOME

INCOME

Employer's Name

City and State

SERVICE PAY \$600.00 excluded

Total

Less: Deductible expenses. (Attach itemized statement)

Compensation after deductible expenses

Column 1

Income Tax Net Income

Column 2

Victory Tax Net Income

\$

\$

\$

\$

\$

\$

2. Dividends

Interest on corporation bonds, bank deposits, notes, etc.

A. Interest on Government obligations, etc.: (a) From line A (8), Schedule A.

(b) From line B (5) and (3), Schedule A.

XXXXXX XX

5. Annuities

(a) Net gain (or loss) from sale or exchange of capital assets. (From Schedule B)

(b) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule B)

XXXXXX XX

6. Rents and royalties. (From Schedule C (1))

\$150

\$150

8. Net profit (or loss) from business or profession. (From Schedule C (2))

(State total receipts, from line 1, Schedule C (2) \$)

9. Income (or loss) from partnerships; fiduciary income; and other income. (From Schedule C (7))

10. Total income in items 1 to 9

\$ 2150

\$ 2150

DEDUCTIONS

11. Contributions. (Explain in Schedule D)

\$ 50

12. Interest. (Explain in Schedule E) (See Instructions 12 and 16 for Victory Tax deduction)

13. Taxes. (Explain in Schedule F) (See Instructions 13 and 16 for Victory Tax deduction)

14. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule G)

15. Medical, dental, etc., expenses. (Explain in Schedule H)

16. Other deductions authorized by law. (Explain in Schedule I)

\$

\$

17. Total deductions in items 11 to 16

\$ 50

\$

18. Income Tax net income (Item 10, col. 1, less item 17, col. 1)

\$ 2100

\$

19. Victory Tax net income (Item 10, col. 2, less item 17, col. 2)

XXXXXX XX

\$ 2150

INCOME AND VICTORY TAX

20. Unpaid balance of 1943 Income and Victory Tax (from line 22, page 4)

\$ 430

70

21. You may postpone, until not later than March 15, 1945, payment of the amount you owe up to one-half of item 19 (c), page 4. Enter the amount postponed. (For persons whose surtax net income for 1942 or 1943 exceeded \$20,000, see Schedule L-2)

13

64

22. Amount paid with this return (Item 20 less item 21)

\$

449

42

23. Refund or Credit If the total of your payments (line 21 (d) on page 4) is larger than your tax (line 20 on page 4), enter the difference.

Indicate by a check mark (✓) what you want done with this overpayment: Refund it to me ☐Apply it on my 1944 estimated tax ☐

I declare under the penalties of perjury that this return (including any accompanying schedule and statement) has been prepared by me and to the best of my knowledge and belief it is true, correct, and complete return.

Prepared by: Theodore W. Goldstein 9/23/44 + Theodore W. Goldstein 9/23/44

Signature of Taxpayer: Theodore W. Goldstein Signature of preparer: Theodore W. Goldstein

I am a member of the Army, Navy, Air Force, or Marine Corps, and I am entitled to a refund of income tax paid by me and to the best of my knowledge and belief it is true, correct, and complete return.

I am a member of the Army, Navy, Air Force, or Marine Corps, and I am entitled to a refund of income tax paid by me and to the best of my knowledge and belief it is true, correct, and complete return.

3/15/44 to 9/23/44 on 435-78-1316

"I was in active service in the Army in 1943 and my recomputed tax for 1943 is zero."

A. Subject's

(1) Name

(2) Last: Wholly tax-exempt portion, principal amount not in excess of \$1,000

(3) Net taxable interest

(4) Obligations of instrumentalities of the United States issued prior to March 1, 1941 (other than Federal

(5) Dividends from share accounts in Federal savings and loan associations in case of shares issued prior to

(6) Subtotal for interest (total of lines 3, 4, and 5)

(7) Last: Amortizable bond premium. (See Instruction 16)

(8) Balance of interest. (Enter as item 4 (a), column 1, page 1)

B. Subject to normal tax, surtax, and Victory Tax:

(1) United States savings bonds acquired on or after March 1, 1941 (cost price)

(2) Other obligations issued on or after March 1, 1941, by the United States or any instrumentality thereof

(3) Subtotal for interest (total of lines 1 and 2). (Enter as item 4 (b), column 2, page 1)

(4) Last: Amortizable bond premium. (See Instruction 16)

(5) Balance of interest. (Enter as item 4 (b), column 1, page 1)

Schedule B.—Schedule B (Form 1040) is a separate sheet and should be used in reporting gains and losses from sales

and exchanges of capital assets and property other than capital assets, and filed with and as a part of this return.

Schedule C(1).—INCOME FROM RENTS AND ROYALTIES. (See Instruction 7)

1. Kind of property	2. Amount	3. Depreciation or depletion (explain below)	4. Repairs (explain below)	5. Other expenses (explain below)	6. Net profit (loss) (For use of columns 1, 4, and 5 (Enter on end 7, page 1))
1 Story Brick 3424 Lawrence Ave	\$ 3180	\$ 1000			\$ 2180

Schedule C(2).—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 8)

(State (1) nature of business

(2) business name

1. Total receipts

COST OF GOODS SOLD

(To be used where necessary as an item

deduction from gross income. (See instructions for use.)

(If the letters "A" or "B" are used on lines 2 and 3 of schedule C, enter cost of goods sold, or net cost, or market value below as lines)

2. Inventory at beginning of year

3. Merchandise bought for sale

4. Labor

5. Material and supplies

6. Other costs (explain below)

7. Total of lines 2 to 6

8. Net inventory at end of year

9. Net cost of goods sold (line 7 less line 8)

10. Gross profit (line 1 less line 9)

OTHER BUSINESS DEDUCTIONS

11. Salary and wages not included as "Labor" (do not deduct compensation for yourself)

12. Interest on business indebtedness

13. Taxes on business and business property

14. Losses (explain below)

15. Bad debts arising from sales or services

16. Depreciation, obsolescence, and depletion (explain below)

17. Rent, repairs, and other expenses (explain below)

18. Amortization of emergency facilities (attach statement)

19. Total of lines 11 to 18

20. Total of lines 9 and 19

21. Net profit (or loss) (line 1 less line 20). (Enter as item 8, page 1)

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN COLUMN 3 AND LINE 14, ABOVE

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Age at fully depreciated (or one at end of year)	5. Depreciation claimed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life months remaining (excluding depreciation)	8. Estimated remaining life months (including depreciation)	9. Depreciation allowable this year
1 Story Brick 3424 Lawrence	7-37	\$6000		\$ 5800	\$ 200	60	43	\$ 1000

EXPLANATION OF DEDUCTIONS CLAIMED IN COLUMNS 4 AND 5, AND LINES 8, 14, AND 17, ABOVE

1. Column of Line No.	2. Explanation	3. Amount	4. Column of Line No.	5. Explanation	6. Amount

Schedule C(3).—INCOME FROM PARTNERSHIPS, FIDUCIARIES, AND OTHER SOURCES. (See Instruction 9)

Name and address of partnership, syndicate, etc.

Name and address of fiduciary.

Other income (state nature)

Total (enter as item 9, page 1)

10-2710

Schedule D.—CONTRIBUTIONS. (See instruction 11)

[illegible]

Schedule F.—INTEREST. (See Instruction 17) Page 8

1. To Whom Paid		2. Amount	
		\$	
Total	(Enter as item 12 above)	\$	

Schedule F.—TAXES. (See Instruction 13)

1. Name

2. Amount

Total: (Enter on item 13, page 1)

Schedule G.—LOSSES AND OTHER DEDUCTIONS. (See instructions 14 and 16)

[illegible]

Schedule H.—MEDICAL, DENTAL, ETC., EXPENSES. (See Instruction 15)

[illegible]

Schedule I.—PERSONAL EXEMPTION AND CREDIT FOR DEPENDENTS. (See Tax Computation Instructions)

(1) Personal Exemption		(2) Credit for Dependents			
Status	Number of credits during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old 18 years or over	Credit claimed (1) head of a family may not claim credit for dependent used to qualify for a head of a family
Single or married and not living with husband or wife, and not head of family	12	500			
Married and living with husband or wife					
Head of a family (explain below)					
			Reason for support if 18 years or over		

Schedule J.—COMPUTATION OF EARNED INCOME CREDIT. (See Tax Computation Instructions)

(1) If your net income is \$3,000 or LESS, use only this part of schedule		(2) If your net income is MORE than \$3,000, use only this part of schedule	
Net income (Item 18, page 1)	\$100	Earned net income (not more than \$14,000)	\$
Earned income credit (10% of net income, above)	\$10	Net income (Item 18, page 1) Earned income credit (10% of earned net income, above, whichever amount is smaller, but do not enter less than \$500)	\$

QUESTIONS

- Did you file a return for any prior year? Yes If so, what was the latest year? 1944 To which Collector's office was it sent? 105-112
2. If you claimed credit for tax paid in Item 21 (c), page 4, to which Collector's office was your declaration sent? _____
3. Separate return was made for the current year, under:
- (a) Name of husband or wife _____
- (b) Personal exemption, if any, claimed thereon _____
- (c) Collector's office to which it was sent _____
4. Check whether this return was prepared on the cash ☐ or credit ☐ basis.
5. Was the rate of your salary or wages increased or decreased during your taxable year? (Yes or No) _____
6. Did you receive during your taxable year any amount claimed to be non-taxable (see General Instruction 11)? No If so, attach schedule showing source, nature, and amount of such income.
7. Did you at any time during your taxable year own directly or indirectly any stock of a corporation, or a personal holding company as defined by section 1361 of the Internal Revenue Code or, attach statement required by General Instruction L.

COMPUTATION OF INCOME AND VICTORY TAX. (See Tax Computation Instructions)

1. Income Tax net income (Item 18, page 1)		\$100
2. Less: Personal exemption. (See Schedule 1-12)	\$ 800	800
3. Credit for dependents. (See Schedule 1-12)		1800
4. Balance (surplus net income)		
5. Less: Certain interest on Government obligations (Item 4 (a), page 1)		
6. Earned income credit. (See Schedule 1-12 or 1-13)	\$ 810	810
7. Balance subject to normal tax		1800
8. Normal tax (5% of line 7)		90
9. Surtax on amount in line 4. (See Form 1040, page 1 of Instructions)		800
10. Total Income Tax (line 8 plus line 9). (If Schedule B is used and alternative tax computation made, enter line 14, Schedule B)		891
11. Less: Income Tax paid to a foreign country or U. S. possession. (Attach Form 11142)		None
12. BALANCE OF INCOME TAX		891
13. NET VICTORY TAX (line 6 of Victory Tax Schedule, below)		87
14. Total of lines 12 and 13		978
15. Income Tax paid at source on tax-free covenant bond interest. (See Footnote 1)		0
16. Line 14 less line 15		978
17. Income Tax for 1942. (See Statement, Form 1040, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 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2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3069, 3070, 3071, 3072, 3073, 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3090, 3091, 3092, 3093, 3094, 3095, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116, 3117, 3118, 3119, 3120, 3121, 3122, 3123, 3124, 3125, 3126, 3127, 3128, 3129, 3130, 3131, 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3141, 3142, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150, 3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160, 3161, 3162, 3163, 3164, 3165, 3166, 3167, 3168, 3169, 3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178, 3179, 3180, 3181, 3182, 3183, 3184, 3185, 3186, 3187, 3188, 3189, 3190, 3191, 3192, 3193, 3194, 3195, 3196, 3197, 3198, 3199, 3200, 3201, 3202, 3203, 3204, 3205, 3206, 3207, 3208, 3209, 3210, 3211, 3212, 3213, 3214, 3215, 3216, 3217, 3218, 3219, 3220, 3221, 3222, 3223, 3224, 3225, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241, 3242, 3243, 3244, 3245, 3246, 3247, 3248, 3249, 3250, 3251, 3252, 3253, 3254, 3255, 3256, 3257, 3258, 3259, 3260, 3261, 3262, 3263, 3264, 3265, 3266, 3267, 3268, 3269, 3270, 3271, 3272, 3273, 3274, 3275, 3276, 3277, 3278, 3279, 3280, 3281, 3282, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3296, 3297, 3298, 3299, 3300, 3301, 3302, 3303, 3304, 3305, 3306, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317, 3318, 3319, 3320, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329, 3330, 3331, 3332, 3333, 3334, 3335, 3336, 3337, 3338, 3339, 3340, 3341, 3342, 3343, 3344, 3345, 3346, 3347, 3348, 3349, 3350, 3351, 3352, 3353, 3354, 3355, 3356, 3357, 3358, 3359, 3360, 3361, 3362, 3363, 3364, 3365, 3366, 3367, 3368, 3369, 3370, 3371, 3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407, 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 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3598, 3599, 3600, 3601, 3602, 3603, 3604, 3605, 3606, 3607, 3608, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675, 3676, 3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3702, 3703, 3704, 3705, 3706, 3707, 3708, 3709, 3710, 3711, 3712, 3713, 3714, 3715, 3716, 3717, 3718, 3719, 3720, 3721, 3722, 3723, 3724, 3725, 3726, 3727, 3728, 3729, 3730, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857,		

EXHIBIT D.

State of Illinois)
County of Cook) ss:

AFFIDAVIT.

Edward H. Wait, being first duly sworn on oath, deposes and says:

That on or about April 16, 1941 this affiant caused an order for envelopes and letterheads for the Bon Air Country Club to be placed with the Waukegan Post, Inc., located in Waukegan, Illinois, which corporation was engaged in publishing a newspaper and also the printing business.

Affiant further states that on or about July 8, 1941, the Waukegan Post, Inc., addressed an invoice to the Bon Air Country Club which invoice stated the merchandise ordered, the price of the merchandise and the date that the merchandise was ordered, namely, April 16, 1941; payment of the invoice was not made to the Waukegan Post, Inc., because of a controversy concerning the price and failure to deliver the merchandise ordered.

Affiant states that a proceeding in Debt was instituted in October, 1941, before Harry Hoyt, Justice of the Peace of Lake County, Illinois, wherein the Waukegan Post, Inc., was plaintiff and Bon Air Catering, Inc., was defendant; summons was issued October 7, 1941 and was returnable on October 14, 1941; judgment was rendered in favor of the plaintiff in the sum of \$57.60; subsequently this judgment was satisfied upon delivery of the merchandise.

Affiant states the invoice above referred to was the only invoice rendered to the Bon Air Country Club or the Bon Air Catering, Inc., by the Waukegan Post, Inc., that resulted in litigation or judgment in any court to the best of my knowledge.

Affiant states that he was associated with the management of, and has had charge of and full knowledge of the ordering and receipt of merchandise for the Bon Air Country Club and the Bon Air Catering, Inc. from the inception of business operations in May, 1938, until January, 1942.

Attached hereto is a photostatic copy of the invoice referred to herein which is marked Exhibit D. (Affiant

76 *Exhibit E-1 (Attached to Amended Motion)*

states that the pencil notations appearing on the invoice were made subsequent to receiving it.)

Affiant further sayeth not.

Edward H. Wait

Subscribed and sworn to before me this 2nd day of December A.D., 1944.

S. R. Hoffman,
Notary Public.

(Seal)

(Billhead of)

THE WAUKEGAN POST
WAUKEGAN, ILLINOIS

Bon Air
Wheeling, Ill.

July 8, 1941

Our Order No. 8727

Date	Description	Charge	Credit	Balance
4-16	5000 Letter heads #1956	21.25		
16	2500 Envelopes #1954	15.75		
16	2500 Envelopes #1955	20.60		57.60

Hoyt 12.00

— EXHIBIT E-1.

State of Illinois)
County of Cook) ss:

AFFIDAVIT.

I, Frank Sampson, upon oath being duly sworn, depose and say as follows:

That I have known William Goldstein, an attorney, with offices located at 140 North Dearborn Street, in the City of Chicago, State of Illinois, for approximately the past thirty-eight years; that on or about the 15th day of September 1941 I discussed with William Goldstein the leasing of the property commonly known as the Albany Park Bank Building at 3422-24 Lawrence Avenue, Chicago, Illi-

nois; that after several discussions with William Goldstein I entered into a lease on the 29th day of September 1941 wherein the parties to said lease were Theodore Goldstein by William Goldstein, Agent, as Lessor, and Hines Realty and Construction Company by F. Sampson, President, as Lessee; that the said lease was for the period commencing on September 29, 1941 and expiring on September 30, 1946, at a monthly rental of Two Hundred and Fifty (\$250.00) Dollars to and including September 30, 1943, and Three Hundred (\$300.00) Dollars per month for the remaining period. Affiant further states that I have paid to the said William Goldstein as agent for Theodore Goldstein the monthly rental each and every month in accordance with the terms and covenants of the aforementioned lease up to and including the month of September, 1944.

This affiant further states that it has been the general custom of William Goldstein to come to the Albany Park Bank Building each month for the collection of the monthly rental. On some occasions, however, Goldstein requested me by telephone to mail him the rental check; that William Goldstein has never at any time during my numerous conversations with him regarding the Albany Park Bank Building stated to me that William R. Johnson had any right, title or interest in the Albany Park Bank Building.

That during the month of November 1943 I stated to William Goldstein that I was interested in the organization of a bank to be operated on the premises of the Albany Park Bank Building and that I was desirous of obtaining from him a lease for a longer period of time than the lease which was in existence and which expired on the 30th day of September 1946. I explained to William Goldstein that it would be necessary for me to have an option to renew the present lease for an additional period of ten years before I could attempt to organize a bank in accordance with the requirements of the State of Illinois. Mr. Goldstein responded by stating that it was not necessary for me to have an option of renewal as I could stay in possession of the premises as long as I wished. I explained to him that it would be necessary for me to have the option of renewal in writing. Goldstein replied by stating that he could not give me an option for extension at that time; that I would have to wait until the court ruled in the "Johnson case" which was then pending before Judge Barnes. I then asked Goldstein if Johnson had anything

to do with the property. Goldstein replied, "Johnson never had any interest in the property and has nothing whatever to do with it." I discussed the question of an option for an extended period of time with Mr. Goldstein on five or six occasions between November 1943 and January 1, 1944. During the latter part of December 1943, in discussing the matter of an option for an extended period of time, William Goldstein suggested that I prepare a lease in conformity with my ideas on the matter. I prepared the said lease and submitted the same to William Goldstein; at that time I explained to William Goldstein that it would also be necessary for me to have the lease signed by his son, Theodore Goldstein, who was owner of the property rather than William Goldstein, as agent, as was done with the five (5) year lease. Affiant further states that William Goldstein told me that his son Theodore was in the Armed Forces of the United States and that it would be necessary for him to bring the lease to his son Theodore for the purpose of having Theodore place his signature on the lease. Goldstein said that he and his wife were going to Hot Springs, Arkansas, and that his son was stationed close by and while visiting there he would visit with his son and obtain his signature to the lease. On the 3rd day of January 1944 William Goldstein presented to me a lease in which the Hines Realty and Construction Company is Lessee, of which corporation I am President, and Theodore Goldstein is Lessor, for the premises commonly known as the Albany Park Bank Building, for a term of ten (10) years beginning on the 1st day of October 1946 and ending on the 30th day of September 1956, at a monthly rental of Three Hundred (\$300.00) Dollars. The said lease provides that the Hines Realty and Construction Company, as Lessee, agrees to deposit with the Lessor, Theodore Goldstein, the sum of Six Thousand (\$6,000.00) Dollars to be held as security for the payment of the rent for the last twenty (20) months under the terms thereof, provided that said money shall be used by Theodore Goldstein to pay the said sum of money upon the delinquent general real estate taxes past due upon the Albany Park Bank Building property; that the said lease further provides that the Lessee shall have the right to assign the said lease upon the formation of a bank prior to July 15, 1944.

Affiant further states that on or about the 10th day of July, 1944 he discussed with William Goldstein the terms

and conditions of the option of renewal entered into on the 3rd day of January, 1944, wherein this affiant was given a ten (10) year option of renewal from Theodore Goldstein for the premises known as the Albany Park Bank Building, provided that this affiant open a bank on the premises or before the 15th day of July, 1944. This affiant realizing that he would be unable to open a bank on or before the 15th day of July 1944 requested William Goldstein, as duly authorized agent for Theodore Goldstein, the owner of the premises, to extend the time limitation of July 15, 1944 to September 15, 1944; that on the 13th day of July, 1944 William Goldstein, as duly authorized agent for Theodore Goldstein, addressed a letter to this affiant wherein William Goldstein, as the agent for Theodore Goldstein, extended the time limitation to this affiant for the opening of the bank to the 15th day of September, 1944.

I further state that I have read all of the foregoing statements contained in this affidavit and I make these statements of my own free will and volition and without any promises, coercion, or consideration to me of any kind whatsoever.

Affiant further sayeth not.

This affidavit consists of three and a half pages.

F. SAMPSON.

Frank Sampson personally appeared before me this 13 day of October A.D. 1944, and under oath states that the foregoing statements are true and correct, and that I, Katherine Kezercki, a Notary Public, for the state above mentioned, saw him subscribe his name above.

Katherine Kezercki,
Notary Public.

(Seal)

My commission as a Notary Public expires 10/4/46.

EXHIBIT E-2.

This Agreement, Made this 3rd day of January A. D. One Thousand Nine Hundred Forty-four (A. D. 1944). Between Theodore Goldstein, party of the first part, and Hines Realty & Construction Co., an Illinois corporation, party of the second part.

Witnesseth, That the said party of the first part does hereby lease to the said party of the second part, the following described property, situated in the City of Chicago, County of Cook and State of Illinois, viz: One Story stone and brick building located at north east corner of Lawrence Avenue and Bernard Streets, commonly known as 3424 Lawrence Avenue, Chicago, Illinois, including balcony, basement, all safe deposit boxes, and all vaults, bank fixtures, furniture, locks, doors, and all other equipment now located in or upon said premises.

for the term Ten Years beginning the First day of October A. D. 1946, and ending the Thirtieth day of September A. D. 1956.

And the party of the second part agrees to pay as rent for said premises, the sum of Thirty Six Thousand and 00/100 Dollars. Payable in payments as set forth in Rider hereto attached as Exhibit "A" and expressly made a part hereof.

And the party of the second part covenants with the party of the first part, that at the expiration of the term of this lease he will yield up the premises to the party of the first part without further notice, in as good condition as when the same were entered upon by the party of the second part, loss by fire or inevitable accident, and ordinary wear excepted; and will pay all assessments that shall be levied upon said premises during said term for water tax.

And the said party of the second part further covenants that it will permit the party of the first part to have free access to the premises hereby leased for the purpose of examining or exhibiting the same, or to make any needful repairs or alterations of such premises, which said first party may see fit to make; also to allow to have placed upon said premises, at all times, notice of "For Sale" or "To Rent" and will not interfere with the same.

It Is Further Agreed, by the said party of the second part that neither it nor its legal representatives will make any alterations, amendments or additions to the buildings on said premises, without the written assent of the party of the first part had thereto, and that neither it nor its legal representatives will use said premises for any purpose calculated to injure or deface the same, or to injure the reputation or credit of the premises or of the neighborhood.

It is further agreed by the party of the second part that he will keep said premises in a clean and healthy condition, in accordance with the ordinance of the City, and the directions of the Board of Health and Public Works.

And the party of the second part covenants that the said premises will be occupied for general real estate business, rental of safe deposit boxes, insurance, currency exchange, finance, banking, travel bureau and/or any other lawful business. And the party of the second part shall have the right to sub-let or assign all or any portion of said premises subject only to the terms and provisions of this lease and providing that party of the second part shall remain liable for the full rental herein prescribed.

And it is Further Expressly Agreed, between the parties, that if default shall be made in the payment of the rent above reserved, or any part thereof, or in any of the covenants or agreements herein contained, to be kept by the party of the second part its heirs, executors, administrators or assigns, it shall be lawful for the party of the first part, or his legal representatives to enter into and upon said premises, or any part thereof, either with or without process of law, to re-enter and re-possess the same, and to distrain for any rent that may be due thereon, at the election of said party of the first part; and in order to enforce a forfeiture for non-payment of rent, it shall not be necessary to make a demand on the same day the rent shall become due; but a demand and refusal or failure to pay at any time on the same day, or at any time on any subsequent day, shall be sufficient; and after such default shall be made, the party of the second part, and all persons in possession under it shall be deemed guilty of a forcible detainer of said premises under the statute.

In Witness Whereof; the parties here hereunto set their hands and seals; the day and year first above written.

Theodore Goldstein (Seal)

Hines Realty & Construction Co. (Seal)

By: Frank Sampson (Seal)

President

Attest:

Maxine Optine,

Secretary.

EXHIBIT "A".

THIS RIDER IS ATTACHED TO AND MADE A PART OF LEASE DATED JANUARY 3rd, 1944, BETWEEN THEODORE GOLDSTEIN, AS LESSOR, AND HINES REALTY & CONSTRUCTION CO., AS LESSEE.

Three Hundred Dollars (\$300.00 on October 1st, 1946, and Three Hundred Dollars (\$300.00) on the first (1st) day of each month thereafter for one hundred-twenty (120) months succeeding, with the exception upon the establishment of a bank which shall go into and take possession of said premises or any part thereof, party of the second part agrees that at the time such bank shall open for business, it will deposit with the party of the first part the sum of Six Thousand Dollars, (\$6000.00) to be held as security for the payment of the rent reserved to be paid during the last twenty months accrued under the terms thereof, provided however, that said money, shall be used by the party of the first part to pay off all accrued and delinquent and general taxes then due and outstanding against the demised premises. It is understood and agreed that the time such payment of Six Thousand Dollars (\$6000.00) be required to be paid by the party of the second part, mutual and satisfactory arrangements will be worked out so as to apply said sum against the unpaid taxes as above provided.

And party of the second part covenants that it will maintain the building on said premises and make all necessary expenditures except general real estate taxes and special assessments.

And the party of the second part covenants that it will pay all personal property taxes hereafter levied upon furniture or equipment located in or upon said premises.

And party of the second part shall have the right to attach or affix any sign or signs in or upon said premises or any portion thereof, interior or exterior, as it may see fit.

And party of the second part shall not be required to insure said premises against fire or extended coverage, nor shall it be required to pay premiums upon any of said insurance placed by said party of the first part, but however, the party of the second part shall be required to carry and pay for public liability and plate glass insurance and to furnish party of the first part with policies for same.

And party of the second part covenants and agrees to maintain the exterior and interior and the roof on said premises. And the parties hereto agree that this lease will be null and void if a bank is not operating in said premises by July 15, 1944.

And the party of the first part hereby covenants and agrees in the extent the bank is established in said premises to consent to the underletting of said premises or any part thereof and assignment of following named lease, notwithstanding anything to the contrary in that lease dated September 29, 1941, entered into by the parties hereto on the said premises.

Theodore Goldstein
Theodore Goldstein
Hines Realty & Construction Co.
By Frank Sampson,
President.

Attest,

Maxine Optine,
Secretary.

(Reverse side of foregoing lease)

LEASE.

to

Amount per Annum, \$
Payable

Received on the within Lease the sums
set opposite the following months for the
years 19— and 19—.

19	May	\$
	June	
	July	
	August	
	September	
	October	
	November	
	December	
19	January	
	February	
	March	
	April	

GUARANTEE

For value received hereby guarantee the payment of the Rent and the performance of the covenants and agreements of the party of the second part in the within lease, in manner and form as in said Lease provided.

Witness hand and seal this day of

..... A. D. 19.....

..... (Seal)

ASSIGNMENT AND ACCEPTANCE

For value received hereby assign all right, title and interest in and to the within Lease unto heirs and assigns; and in consideration of the consent to this assignment by the Lessor guarantee the performance by said of all the covenants on the part of the second party in said Lease mentioned.

..... (Seal)

In consideration of the above assignment and the written consent of the party of the first part thereto, hereby assume and agree to make all payments and perform all the covenants and conditions of the within Lease, by said party of the second part to be made and performed.

Witness hand and seal this day of

..... A. D. 19.....

..... (Seal)

..... (Seal)

CONSENT TO ASSIGNMENT

..... hereby consent to the assignment of the within Lease to

on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the second party as therein mentioned, and that no further assignment of said Lease or subletting of the premises or any part thereof shall be made without.....written assent first had thereto.

Witness.....hand.... and seal—this..... day of
.....A. D. 19.....

.....(Seal)

LESSOR'S ASSIGNMENT

In consideration of One Dollar, to.....in hand paid,
.....hereby transfer, assign and set over to
.....and assigns
.....interest in the within Lease, and the rent
thereby secured

Witness.....hand.... and seal.... this..... day of
.....A. D. 19.....

.....(Seal)

.....(Seal)

Filed
Dec. 7,
1944

40 On the 7th day of December, 1944, the Government filed a notice and Government's answer to defendants' amended motion for a new trial, which said notice and Government's answer were in words and figures as follows, to-wit:

41 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

United States of America

vs.

William R. Johnson

and

United States of America

vs.

Jack Sommers, James A. Hartigan,
John M. Flanagan, William P. Kelly
and Stuart Solomon Brown.

No. 32168

No. 32168

NOTICE.

To: Harold R. Schradzke,
33 North La Salle Street,
Chicago, Illinois

Homer Cummings,
1616 K Street, N. W.,
Washington, D. C.

William J. Dempsey,
Bowen Building,
Washington, D. C.

You Are Hereby Notified that the undersigned has this day filed with the Clerk of the District Court for the Northern District of Illinois its Answer to Defendants' Amend-

ed Motion for New Trial, copy of which Answer and exhibits thereto attached is herewith served upon you.

(Sgd) J. Albert Woll,
United States Attorney.

Received a copy of the foregoing Notice and Answer and exhibits therein referred to this 7th day of December, A. D. 1944.

(Sgd.) Harold R. Schradzke.

42 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—No. 32168)

Filed
Dec. 7,
1944

**GOVERNMENT'S ANSWER TO DEFENDANTS'
AMENDED MOTION FOR NEW TRIAL.**

This case is now before this Court on Defendants' Amended Motion for a New Trial based on the contention that William Goldstein, a Government witness, perjured himself at Defendants' trial. After this Court denied Defendants' original Motion and the Circuit Court of Appeals affirmed its action in that connection, the Defendants filed a Petition for Certiorari in the Supreme Court. Shortly before the convening of the 1944 term of that Court and while the Petition for Certiorari was pending, counsel for the defendants requested the Government to inform the Supreme Court that Theodore Goldstein, William Goldstein's son, had recently filed income-tax returns covering the rentals from the Albany Park Bank Building. As this Court will recall, at defendants' trial William Goldstein testified that he purchased this property at the request of the defendant, William R. Johnson, with money furnished by Johnson.

43 The title was taken in the name of his son, Theodore Goldstein, and a quit-claim deed to the property was subsequently delivered to Johnson. Through an investigation conducted by the Bureau of Internal Revenue, we verified the fact that the returns had been filed by Theodore Goldstein and, also, ascertained the circumstances under which they were filed. We obtained our information on the subject principally from an affidavit by Stanley A. Wod-

rick, Deputy Collector of the Internal Revenue, which was in question and answer form and is attached hereto as Government's Exhibit 3. While we believe that the circumstances under which the returns were filed were such as to dissipate any significant relevance the filing of the returns might otherwise have had, the Solicitor General, nevertheless acceded to the defendants' request that the Supreme Court be advised of the filing of the returns. This was done in a Supplemental Memorandum in which we informed the Court of the filing of the returns and of the circumstances under which they were filed. The Supreme Court declined to consider any of this information on the ground that it was not a part of the record and, on motion of the defendants, postponed consideration of the Petition for Certiorari, with the result that a Motion for Remand was filed in, and granted by, the Circuit Court of Appeals.

The Defendants' Amended Motion for a New Trial is based principally upon the contention that the filing of these income tax returns by Theodore Goldstein proves that William Goldstein committed perjury at their trial. This Court now has the returns before it. Affidavits showing the circumstances under which the returns were filed are attached hereto and incorporated herein as Government's Exhibits Nos.:

- I., being an affidavit of Theodore Goldstein, which has attached thereto as Exhibits I(a) and I(b) copies of income tax returns for the years 1941 and 1942;
- II. being an affidavit of William Goldstein, which was attached thereto as Exhibit II(a) a typewritten communication concerning which Goldstein in his affidavit states he did not sign, and II(b) a letter to Carter H. Harrison, dated June 13, 1944, which Goldstein in his affidavit states he did sign;
- 44 III. being a question and answer affidavit signed by Stanley A. Wodrick on August 12, 1944;
- IV., being an affidavit of Stanley A. Wodrick, signed by him on December 7, 1944;
- V., being an affidavit of Edward H. Schulz, signed by him on December 7, 1944, and which has attached thereto as Exhibit V(a) a photostatic copy of a written communication which Mr. Schulz in his affidavit states he received from the Chief Field Deputy of the Treasury Department of the Internal Revenue Bureau.

The affidavits speak for themselves; support and amplify our statements to the Supreme Court, and plainly show that the filing of income tax returns by Theodore Goldstein covering the rentals from the Albany Park Bank Building in no way tends to prove that William Goldstein committed perjury at defendants' trial. On the contrary, the evidence now before the court corroborates the Court's original conclusion that Goldstein did not perjure himself.

Defendants also rely in their Amended Motion upon two affidavits regarding other, unrelated matters, for the most part. The Sampson affidavit is merely cumulative of matters before this Court on the defendants' original motion for new trial. The statements attributed to Goldstein by Sampson in his affidavit have been directly denied by William Goldstein in his affidavit (Government Exhibit II). The Wait affidavit, which most certainly is not newly discovered evidence, is so obviously remote from any issues before the Court on this Motion as to require no comment.

On the basis of the affidavits submitted herewith, which make these additional matters a part of Court record, we respectfully submit that there is no merit to defendants' Amended Motion for a New Trial and that the Motion should be denied.

Respectfully submitted,

(Sgd) Samuel O. Clark, Jr.,
Assistant Attorney General.

(Sgd) J. Albert Woll,
United States Attorney.

45

GOVERNMENT'S EXHIBIT NO. 1.

State of Illinois, }
County of Cook. } ss.

AFFIDAVIT.

Theodore W. Goldstein, being first duly sworn on oath, deposes and says:

1. That he is 32 years of age and that he lives at 415 Aldine Avenue, Chicago, Illinois, with his parents William and Rose Goldstein and is presently employed by the Ordnance Department of the United States Government.

2. That from the Fall of the year 1931 until the Spring of 1933 he was a student at the University of Illinois, Champaign, Illinois, and that from the Fall of the year 1933 until the Spring of the year 1935, he was a student at Knox College, Galesburg, Illinois, and that in the Fall of the year 1935 he enrolled as a law student at the Loyola University School of Law at Chicago, Illinois, and that he graduated from that law school in the Spring of 1938; that during this period he was not gainfully employed, except during the years 1935 to 1938 inclusive, when he secured part time employment while attending the University of Loyola; that the income derived from the part time employment was spent by affiant in helping defray his expenses at Loyola University.

3. That he is title holder of record to the property located at 3424 Lawrence Avenue in the City of Chicago, upon which property is located a building known as the Albany Park Bank Building; that while he is the title holder of record, he is not the actual owner of this property and does not have, and never did have any beneficial or financial interest, or any interest of any kind in that property; that he did not purchase the property and did not spend any funds for its purchase, and did not have anything whatever to do with the purchase of that building,
46 and that this property was not purchased for him in any manner by anyone; that he does not now and never has claimed any interest in this property or any income or any interest in any income derived from this property, and has not at any time received any rents, interest, profits, or any other income, whatever, from this property.

4. That he has never regarded himself as the actual owner of the property and has never regarded himself as entitled to any rentals or other income from this property. In this connection, affiant states that he filed income tax returns with the Collector of Internal Revenue for the years 1941, 1942, and 1943. That in these returns he did not claim as income any rentals or other income from the property at 3424 Lawrence Avenue, Chicago, Illinois, for the reason that he did not then and did not at any time regard that property as his or regard himself as entitled to any income from this property, and for the further reason that he did not, in fact, receive any income from this property. Affiant further states that copies of the income tax returns covering the years 1941 and 1942 are attached to this affidavit and made a part hereof, and that these

copies are true and correct copies of the returns for those years filed by him with the Collector of Internal Revenue.

5. That in the summer of this year affiant affixed his signature to delinquent income tax returns for the years 1937 to 1940, inclusive, and to amended income tax returns for the years 1941, 1942, and 1943; that he has examined these returns which appear as exhibits in the defendants' amended motion for a new trial in the case of *United States v. William R. Johnson, et al.*, and that the returns appearing as exhibits in the defendants' amended motion for a new trial are true and correct copies of the delinquent and amended income tax returns which he signed in the summer of this year.

47 6. That affiant signed these delinquent and amended returns under the following circumstances:

That affiant's father, William Goldstein, told affiant that the Internal Revenue Department was insisting that returns be filed by affiant as the title holder of record to the property in question, and that affiant's father, William Goldstein, told affiant that he had fully explained to the Internal Revenue Department that the affiant was merely the record title holder of the property in question and had no actual interest in the same, and that affiant's father, William Goldstein, told affiant that the Internal Revenue Department was fully advised by him of the fact that the affiant was merely the record title holder and had no interest in the property or its rents, issues, or profits, but that the Internal Revenue Department had nevertheless insisted that as record title holder, affiant was required to file delinquent and amended returns for the property in question, and that, unless such returns were filed, an assessment would immediately be made against the affiant.

7. Affiant further states that upon this information being given him by his father, he signed the returns, despite the fact that he did not claim any interest in the property or any income derived from the property and, in fact, was not the actual owner of the building and did not receive any profits or other income, whatever, from the property in question.

(Sgd.) Theodore W. Goldstein.

Subscribed to and sworn to before me this 7th day of December, A. D. 1944.

(Sgd.) Anna L. Minahan,

Notary Public.

FORM 1040 A
MASSACHUSETTSOPTIONAL
UNITED STATES

1941

INDIVIDUAL INCOME TAX RETURN

THIS RETURN MAY BE FILED INSTEAD OF FORM 1040 BY
CITIZENS OR RESIDENT ALIENS IF GROSS INCOME
IS NOT MORE THAN \$2,000 AND IS ONLY
FROM SOURCES STATED HEREON

PRINT NAME AND HOME OR RESIDENTIAL ADDRESS PLAINLY BELOW

Theodore William Goldstein
(Please give names of both husband and wife, if this is a joint return)

418 Aldine Ave.
(Street and number, or rural route)

Chicago Cook Illinois
(Post office) (County) (State)

Occupation Attorney

Do not write in these spaces

1034709

Agent

(Collector's Stamp)

Cash—Check—M. O.

DEPENDENTS ON LAST DAY OF YEAR

List persons deriving their chief support from you (other than husband or wife) under 18 years of age or mentally or physically incapable of self-support

Name of dependent

Relationship

If 18 years of age or more, give reason for being

GROSS INCOME LESS ALLOWANCE FOR DEPENDENTS

1. Salary, wages, and compensation for personal services

2. Dividends, interest, rent, annuities, and royalties

3. Total

4. Less: \$400 for each dependent

(If you are the head of a family (any definition on other side) only because of dependent(s) listed above, \$400 for each listed dependent except one)

5. INCOME SUBJECT TO TAX

TAX

6. Tax to be paid (from Column A or B of table on other side)

I/we swear (or affirm) that this return has been examined by me/us, and, to the best of my/our knowledge and belief, is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and regulations issued under authority thereof; and that I/we had no income from sources other than stated herein.

Subscribed and sworn to by Theodore William Goldstein

Theodore William Goldstein

(Signature)

before me this 16th day of March, 1942.

Notary Public
(Signature and title of official administering oath)



(If this is a joint return, it must be signed by both husband and wife. It must be sworn to before a proper officer by the person signing the return.)

An income tax return is required to be filed by single persons having a gross income (item 3 above) of \$750 or more and married persons having a gross income of \$1,500 or more. A husband and wife may make a joint return on this form if their combined gross income is not more than \$3,000. A separate return may be made on this form if the gross income of the one filing the return is not more than \$3,000. If this return is used, it must be filed with the Collector of Internal Revenue for your district on or before March 15, 1942. The tax may be paid in equal quarterly installments commencing March 15, 1942. Pay tax, if any, to the Collector and if payment is made by check or money order, make payable to "Collector of Internal Revenue."

PLACE CHECK MARK (✓) IN THE APPLICABLE BLOCK ☐ BELOW

Single (and not head of family) on last day of year.....

Married but not living with husband or wife (and not head of family) on last day of year..... ☒Married and living with husband or wife on last day of year but each filing separate returns..... ☐

IF YOU CHECKED ONE OF ABOVE, FIND YOUR TAX IN COLUMN A

Married and living with husband or wife on last day of year and this return includes all income of husband and wife..... ☐Head of family (a single person or married person not living with husband or wife who exercises family control and supports closely connected dependent relative(s) in one household) on last day of year..... ☐

IF YOU CHECKED ONE OF ABOVE, FIND YOUR TAX IN COLUMN B

IF income subject to tax (line 2) is:		COLUMN A		COLUMN B		IF income subject to tax (line 2) is:		COLUMN A		COLUMN B		IF income subject to tax (line 2) is:		COLUMN A		COLUMN B	
Over	But not over	Year tax is	Year tax is	Over	But not over	Year tax is	Year tax is	Over	But not over	Year tax is	Year tax is	Over	But not over	Year tax is	Year tax is	Over	But not over
81	8750	80	80	81,500	81,525	863	81	82,380	82,275	8124	860	81	82,380	82,275	8124	860	
750	775	1	0	1,525	1,550	85	2	2,275	2,300	130	83	85	2	2,275	2,300	130	83
775	800	2	0	1,550	1,575	86	3	2,300	2,325	132	85	86	3	2,300	2,325	132	85
800	825	3	0	1,575	1,600	70	4	2,325	2,350	134	87	70	4	2,325	2,350	134	87
825	850	4	0	1,600	1,625	71	5	2,350	2,375	137	88	71	5	2,350	2,375	137	88
850	875	5	0	1,625	1,650	74	6	2,375	2,400	139	89	74	6	2,375	2,400	139	89
875	900	6	0	1,650	1,675	75	7	2,400	2,425	141	90	75	7	2,400	2,425	141	90
900	925	7	0	1,675	1,700	78	8	2,425	2,450	143	91	78	8	2,425	2,450	143	91
925	950	8	0	1,700	1,725	80	9	2,450	2,475	145	92	80	9	2,450	2,475	145	92
950	975	9	0	1,725	1,750	83	10	2,475	2,500	147	93	83	10	2,475	2,500	147	93
975	1,000	10	0	1,750	1,775	85	11	2,500	2,525	150	94	85	11	2,500	2,525	150	94
1,000	1,025	11	0	1,775	1,800	87	12	2,525	2,550	152	95	87	12	2,525	2,550	152	95
1,025	1,050	12	0	1,800	1,825	89	13	2,550	2,575	154	96	89	13	2,550	2,575	154	96
1,050	1,075	13	0	1,825	1,850	91	14	2,575	2,600	156	97	91	14	2,575	2,600	156	97
1,075	1,100	14	0	1,850	1,875	93	15	2,600	2,625	158	98	93	15	2,600	2,625	158	98
1,100	1,125	15	0	1,875	1,900	96	16	2,625	2,650	160	99	96	16	2,625	2,650	160	99
1,125	1,150	16	0	1,900	1,925	98	17	2,650	2,675	162	100	98	17	2,650	2,675	162	100
1,150	1,175	17	0	1,925	1,950	100	18	2,675	2,700	165	97	100	18	2,675	2,700	165	97
1,175	1,200	18	0	1,950	1,975	102	19	2,700	2,725	167	99	102	19	2,700	2,725	167	99
1,200	1,225	19	0	1,975	2,000	104	20	2,725	2,750	169	102	104	20	2,725	2,750	169	102
1,225	1,250	20	0	2,000	2,025	106	21	2,750	2,775	172	104	106	21	2,750	2,775	172	104
1,250	1,275	21	0	2,025	2,050	109	22	2,775	2,800	174	106	109	22	2,775	2,800	174	106
1,275	1,300	22	0	2,050	2,075	111	23	2,800	2,825	177	108	111	23	2,800	2,825	177	108
1,300	1,325	23	0	2,075	2,100	113	24	2,825	2,850	180	109	113	24	2,825	2,850	180	109
1,325	1,350	24	0	2,100	2,125	115	25	2,850	2,875	183	110	115	25	2,850	2,875	183	110
1,350	1,375	25	0	2,125	2,150	117	26	2,875	2,900	186	114	117	26	2,875	2,900	186	114
1,375	1,400	26	0	2,150	2,175	119	27	2,900	2,925	189	117	119	27	2,900	2,925	189	117
1,400	1,425	27	0	2,175	2,200	124	28	2,925	2,950	191	119	124	28	2,925	2,950	191	119
1,425	1,450	28	0	2,200	2,225	126	29	2,950	2,975	194	121	126	29	2,950	2,975	194	121
1,450	1,475	29	0	2,225	2,250	126	30	2,975	3,000	197	123	126	30	2,975	3,000	197	123
1,475	1,500	30	0														

The income to be reported in this return is gross income (not including income which is wholly exempt from income tax) without any deductions. The taxes in the above table are such that they generally compensate for deductions and credits not allowable if this form is used.

FORM 1040 A
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

OPTIONAL
UNITED STATES

INDIVIDUAL INCOME TAX RETURN

THIS RETURN MAY BE FILED INSTEAD OF FORM 1040 BY CITIZENS
(OR RESIDENT ALIENS) REPORTING ON THE CASH BASIS IF
GROSS INCOME IS NOT MORE THAN \$3,000 AND IS ONLY
FROM SALARY, WAGES, DIVIDENDS, INTEREST,
AND ANNUITIES

PRINT NAME AND HOME OR RESIDENTIAL ADDRESS PLAINLY BELOW

GOLDSTEIN THEODORE WIM.

(Name) (Use your share of both husband and wife, if this is a joint return)

415 ALDINE AVE.

(Street and number, or rural route)

CHICAGO

(For other)

COOK

(County)

ILL.

(State)

Occupation

Social Security
number, if any 339-07-8590

Name and address of employer SUN SHIPBUILDING 1 DRY DOCK
CO. CHESTER PENNA.

If you had more than one employer, attach statement showing name and address
and amount received from each.

CALENDAR YEAR
1942

Do not write in these spaces

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DEPENDENTS ON JULY 1, 1942

Check (other than husband or wife) deriving their chief support from you if they are under 18 years of age or if they are
mentally or physically incapable of self-support

NAME OF DEPENDENT

RELATIONSHIP

IF 18 YEARS OF AGE OR OVER, GIVE REASON FOR LISTING

GROSS INCOME LESS ALLOWANCE FOR DEPENDENTS

1. Salary, wages, and compensation for personal services

2. Dividends, interest, and annuities

3. Total

4. Less: \$385 for each dependent

(If you are the head of a family (see definition under item 5 on other side) only because of dependent(s) listed above, \$385 for each
listed dependent except one.)

5. INCOME SUBJECT TO TAX

TAX

6. Tax on item 5 (from Column A, B, or C of table on other side)

I declare, under the penalties of perjury, that this return has been examined by me, and, to the best of my own knowl-
edge and belief, is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal
Revenue Code and regulations issued under authority thereof; and that I've had no income from sources other than stated herein.

MARCH 2

1943.

Theodore H. Goldstein

(If this return includes gross income of both husband and wife, it must be signed by both.)

Filing requirements.—An income tax return must be filed by single persons having a gross income (item 5 above) of \$200 or more and married persons having a gross income either separately or combined of \$1,000 or more.

Military and naval personnel.—Members of the military or naval forces of the United States below the grade of commissioned officer on December 31, 1942, should not include in gross income the first \$200 of single or such date, or the first \$200 if married or head of a family on such date, received as compensation for active service.

Return of husband and wife.—Husband and wife may use this form if their joint return if they were living together on July 1, 1942, and if their joint gross income for the calendar year is not more than \$3,000. A separate return may be made on this form if the gross income for the calendar year of the one filing the return is not more than

\$3,000, except that in the case of a husband and wife living together at any time during the calendar year separate returns may not be made on this form unless each elects to use this form.

Allowance for dependents.—Allowance of \$385 for each dependent is allowable when this form is used. When Form 1040 is used, the allowance for each dependent is \$350.

Amended returns.—If a qualified taxpayer elects to use this form, amended returns may not be made on Form 1040.

Filing of returns and payment of tax.—The return must be filed with the Collector of Internal Revenue for your district on or before March 15, 1943. The tax may be paid in equal quarterly installments commencing March 15, 1943. Pay tax, if any, to the Collector and if payment is made by check or money order, make payable to "Collector of Internal Revenue."

INDICATE YOUR STATUS ON JULY 1, 1942, BY PLACING CHECK MARK (✓) IN THE APPLICABLE BLOCK ☐ BELOW

1. Single (and not head of family) on July 1, 1942. ☐

2. Married and not living with husband or wife (and not head of family) on July 1, 1942. ☒

IF YOU CHECKED No. 1 OR No. 2 ABOVE, FIND YOUR TAX IN COLUMN A

3. Married and living with husband or wife on July 1, 1942, but each filing separate returns on this form. ☐

IF YOU CHECKED No. 3 ABOVE, FIND YOUR TAX IN COLUMN B

4. Married and living with husband or wife on July 1, 1942, and spouse had no gross income for the entire year. ☐

5. Married and living with husband or wife on July 1, 1942, and this return includes gross income of both husband and wife for the entire year. ☐

6. Head of family (a single person or married person not living with husband or wife who exercises family control and supports closely connected dependent relative(s) in one household) on July 1, 1942. ☐
(State number of such dependent relatives.....)

IF YOU CHECKED No. 4, 5, OR 6 ABOVE, FIND YOUR TAX IN COLUMN C

If income subject to tax (from 5 on other side) is		COLUMN A			If income subject to tax (from 5 on other side) is		COLUMN A			If income subject to tax (from 5 on other side) is		COLUMN A		
Over	But not over	Year tax is	Year tax is	Year tax is	Over	But not over	Year tax is	Year tax is	Year tax is	Over	But not over	Year tax is	Year tax is	Year tax is
80	8325	80	80	80	81,360	81,375	8141	8192	819	82,175	82,300	8293	8364	8150
825	850	4	0	0	1,375	1,400	145	150	14	2,300	2,325	244	269	155
850	875	4	0	0	1,400	1,425	148	150	17	2,325	2,350	249	273	159
875	900	7	0	0	1,425	1,450	154	155	21	2,350	2,375	256	277	163
900	925	11	0	0	1,450	1,475	155	159	25	2,375	2,400	261	282	168
925	950	15	0	0	1,475	1,500	162	163	29	2,400	2,425	265	286	172
950	975	30	3	0	1,500	1,525	167	168	34	2,425	2,450	269	290	176
975	1,000	34	6	0	1,525	1,550	171	172	38	2,450	2,475	274	295	181
1,000	1,025	38	9	0	1,550	1,575	175	176	42	2,475	2,500	278	299	185
1,025	1,050	83	14	0	1,575	1,600	180	181	47	2,500	2,525	282	303	189
1,050	1,075	87	18	0	1,600	1,625	184	185	51	2,525	2,550	287	308	194
1,075	1,100	41	22	0	1,625	1,650	188	189	55	2,550	2,575	291	312	198
1,100	1,125	46	27	0	1,650	1,675	193	194	59	2,575	2,600	295	316	202
1,125	1,150	50	31	0	1,675	1,700	197	198	64	2,600	2,625	299	321	207
1,150	1,175	54	35	0	1,700	1,725	201	202	68	2,625	2,650	304	325	211
1,175	1,200	59	40	0	1,725	1,750	206	207	73	2,650	2,675	308	329	215
1,200	1,225	63	44	0	1,750	1,775	210	211	77	2,675	2,700	313	334	220
1,225	1,250	67	48	0	1,775	1,800	214	215	81	2,700	2,725	317	338	224
1,250	1,275	71	52	0	1,800	1,825	218	219	85	2,725	2,750	321	342	228
1,275	1,300	76	57	0	1,825	1,850	223	224	90	2,750	2,775	326	347	233
1,300	1,325	80	61	0	1,850	1,875	227	228	94	2,775	2,800	331	351	237
1,325	1,350	84	65	0	1,875	1,900	231	232	98	2,800	2,825	335	355	241
1,350	1,375	89	70	0	1,900	1,925	236	237	103	2,825	2,850	341	359	245
1,375	1,400	93	74	0	1,925	1,950	240	241	107	2,850	2,875	346	364	250
1,400	1,425	97	78	0	1,950	1,975	244	245	111	2,875	2,900	351	369	254
1,425	1,450	102	83	0	1,975	2,000	249	250	116	2,900	2,925	356	374	258
1,450	1,475	106	87	0	2,000	2,025	253	254	120	2,925	2,950	361	379	263
1,475	1,500	110	91	0	2,025	2,050	257	258	124	2,950	2,975	366	384	267
1,500	1,525	115	96	0	2,050	2,075	262	263	129	2,975	3,000	371	389	271
1,525	1,550	119	100	0	2,075	2,100	266	267	133	3,000	3,025	376	394	276
1,550	1,575	123	104	0	2,100	2,125	270	271	137	3,025	3,050	381	399	280
1,575	1,600	128	109	1	2,125	2,150	275	276	142	3,050	3,075	386	404	284
1,600	1,625	132	113	4	2,150	2,175	279	280	146	3,075	3,100	391	409	289
1,625	1,650	136	117	7										

The income to be reported in this return is gross income (not including income which is wholly exempt from income tax) without any deductions. The taxes in the above table make allowance for personal exemption, earned income credit, and deductions aggregating 6 percent of gross income.

March 2, 1943

Collector of Internal Revenue
Fidelity Building,
Chicago, Ill.

Dear Sir:

On December 11, 1942, I enlisted in the United Army Air Corps Civilian Reserve for pilot training. This training is to cover a period of 8 months, during which time I do not receive any income. I therefore find it necessary to sustain myself from a small reserve, which makes it impossible to effect any payment on the tax due for 1942 income. I would appreciate if this tax could be deferred until I am in a better position to liquidate this obligation.

I thank you for any consideration extended, and beg to remain,

Yours very truly,
Theodore W. Kattin

GOVERNMENT'S EXHIBIT 2.

State of Illinois }
County of Cook } ss:

AFFIDAVIT

William Goldstein, being first duly sworn, upon oath deposes and says that he is an attorney in the City of Chicago; has practiced law in this city for the past several years, his office being located at 140 North Dearborn Street, Chicago, Illinois.

On or about the first part of April, 1944 (the exact date is unknown to me at this time), Mr. Stanley A. Wodrick, a Deputy Collector, with office located at 3256 North Pulaski Road, Chicago, Illinois, called at my office in the afternoon, presented his card and credentials, and requested me to show him a deed executed to Theodore W. Goldstein with reference to the property located at 3424 Lawrence Avenue, Chicago, Illinois, known as the Albany Park Bank Building. I looked through my file and could not find the deed, and I suggested that we walk over to the Recorder's Office at the County Building, which we did; and in checking through the records we found a photostatic copy of the deed, showing title in Theodore Goldstein.

Mr. Wodrick, at that time, advised me that his office had requested him to check this property and income. I advised Mr. Wodrick that Theodore Goldstein was not the owner of the property; he was merely the holder of the record title.

54 Mr. Wodrick told me that in view of the fact that Theodore Goldstein is the title owner of record, his superior had ruled that Theodore must file returns and pay a tax. I told him it would not be done. Mr. Wodrick thereafter called on me at my office on as many as ten different occasions or more and during the visits we discussed the situation. I advised him at all times that Theodore Goldstein and myself have absolutely no interest in this property.

Mr. Wodrick suggested that I call at his office, 3256 North Pulaski Road, to take the matter up further with Mr. Edward H. Schulz, who is in charge of the office. I made an appointment for a Saturday morning; called at that address; met Mr. Wodrick, who took me into Mr. Schulz's office; introduced me, and we discussed this mat-

ter. I told Mr. Schulz that Theodore was merely the record title holder of the property and not the actual owner. Mr. Schulz took the same position that Mr. Wodrick took and insisted that returns be filed and a tax paid. After further discussion Messrs. Schulz and Wodrick stated that the Government is interested in collecting a tax and the only one they can collect it from is the owner who appears of record. I left the office after advising Mr. Wodrick and Mr. Schulz that I would not pay tax on the rental income.

Sometime later Mr. Wodrick called me at my office and we had a further conversation concerning this matter. As a result of this conversation I concluded that if Theodore Goldstein failed to file returns and pay a tax that an assessment would be made against him for whatever taxes were claimed to be due. Sometime later I again called on Mr. Wodrick at his office. He advised me that he was working on the figures and would prepare the returns for Theodore's signature, and again we discussed the tax and ownership; he persisted in his position that Theodore Goldstein, who is the title owner of record, must file returns and pay a tax.

Thereafter, I again called on Mr. Wodrick at his office. He handed me the income tax returns which were prepared by him for Ted Goldstein's signature. I took them home with me and had Theodore sign them and returned them to Mr. Wodrick's office. Mr. Wodrick acknowledged the signature on the returns. He then took me to the cashier's cage; I paid the tax and walked back to his desk with him. He called over Mr. Sherwood Hinman, who is the chief deputy in charge of the northwestside branch, located at 3256 North Pulaski Road, who replaced Mr. Edward H. Schulz. While sitting there, Mr. Wodrick presented to me a return, all filled in, showing a tax of over \$13,000.00. I asked him what it was. He told me, in view of the fact that Theodore is the title owner, they must collect a tax on the \$60,000.00, which was the purchase price of this property in question. I told him I wouldn't pay that under any circumstances; that Theodore had had no money and, particularly, as great an amount as \$60,000.00. Mr. Hinman then spoke up and said, "What seems to be the trouble; is the assessment too much money?" I spoke up and said that "if the amount was only thirteen cents I wouldn't pay it." Mr. Wodrick retained the return and I left his office.

During the course of one of my conferences with Mr. Wedrick, he presented to me at my office a memorandum which read in part as follows: "I have acted as attorney and agent for my son, Theodore, the owner, in the management of the property located at 3424 Lawrence Avenue, Chicago, Illinois, purchased for my son, Theodore, in 1937." After looking this statement over I told Mr. Wodrick that it was not correct; not true, and I refused to sign it. A copy of this memorandum is attached to this affidavit. At some later date, when I was in Mr. Schulz's office at 3256 North Pulaski Road, a new type-written memorandum was prepared stating that Theodore was the title owner of record, which was signed by me. A copy of this memorandum is also attached to this affidavit.

I have read the affidavit of Frank Sampson, marked Exhibit E-1, dated October 13, 1944, which I understand was filed by the defendants in the case of United States vs. William R. Johnson, et al. In my discussions with Mr. Sampson relative to an option to renew the lease then in existence, I did not state to him that it was not necessary for him to have an option of renewal as he could stay in possession of the premises as long as he wished. At no time did I make any such statement to

57 Sampson. Neither at that time nor at any other time did I say to Sampson in connection with an option for extension of the lease that Sampson would have to wait "until the court ruled in the Johnson case which was then pending before Judge Barnes." I further state that at no time did I state to Sampson that "Johnson never had any interest in the property and has nothing whatever to do with it." I never did make such a statement to Sampson or any statement like it.

At this time I reaffirm the testimony given by me in the trial of the case of United States vs. William R. Johnson, et al., concerning the Albany Park Bank Building and, in particular restate that the amount expended for the purchase of the Albany Park Bank Building property was \$59,887.05 and that I got that money from Mr. Johnson in the form of currency.

In conclusion I state that I do not have and never did have any right, title or interest of any kind in the property at 3424 Lawrence Avenue, Chicago, Illinois, or in its rents, profits, income or issues, and do not now and never have claimed any such right, title or interest.

(Sgd.) William Goldstein.

Subscribed and sworn to before me this 7th day of December, A.D. 1944.

Anna L. Minahan (Sgd.)
Notary Public.

58 GOVERNMENT'S EXHIBIT NO. 2A.

I have acted as attorney and agent for my son, Theodore, the owner, in the management of the property located at 3424 Lawrence Avenue, Chicago, Illinois, purchased for my son Theodore in 1937. For several years the premises were operated by Theodore Goldstein under the name Albany Park Safe Deposit Vault Company.

In 1941 Theodore entered into a lease with the Hines Realty and Construction Company, the terms being \$250.00 per month.

During the early part of 1944 a new lease was entered into with Frank Sampson with provision that if a bank is operated on the premises the rental would be \$300.00 per month.

I have received the monthly rental payments from January 1942 to present time from Frank Sampson, as President of Hines Realty and Construction Company in the form of checks made payable to me as agent. I endorsed the checks received and gave the currency to my son Theodore.

As attorney and agent, for my son Theodore, I am authorized by him to make payment to the Collector of Internal Revenue the amount of tax owed by him because of his failure to pay the income tax due on the income received by him from this property.

My son Theodore is at the present time a member of the armed forces of the United States.

59 GOVERNMENT'S EXHIBIT NO. 2B.

Chicago, Illinois,
June 13, 1944.

Honorable Carter H. Harrison
Collector
U. S. Court House
Chicago, Illinois

Dear Sir:

Reference is made to rental income from property located at 3424 Lawrence Avenue, Chicago, Illinois, which

has not been reported in income tax returns by my son, Theodore Goldstein, title owner of record, and which was received by me as agent.

This property was acquired by purchase in 1937 in the name of my son, Theodore Goldstein, title owner of record, and leased to the Hines Realty and Construction Company, the present occupants, from January 1942 on, at \$250.00 per month.

Real estate taxes in the amount of \$738.13 for 1937, \$1465.60 for 1938 and \$1531.08 for 1939 were paid by the Albany Park Safe Deposit Vault Company, and were shown as a deduction on the corporate returns of the Albany Park Safe Deposit Vault Company for those years. No real estate taxes have been paid for the years 1940, 1941, 1942 and 1943.

No rent was paid by the Albany Park Safe Deposit Vault Company to Theodore Goldstein, title owner of record, for space occupied in building located at 3424 Lawrence Avenue, Chicago, Illinois during 1937 to October, 1941, inclusive.

As agent for my son Theodore, who is at the present time a member of the armed forces of the United States, I am authorized by him to make payment to the Collector of Internal Revenue any tax owed by him on rental income in question received from this property.

/s/ Wm. Goldstein.

60

GOVERNMENT'S EXHIBIT NO. 3.

Testimony of Mr. Stanley A. Wodrick, Deputy Collector of Internal Revenue, taken in the office of the Intelligence Unit, Bureau of Internal Revenue, Room 284-C, U. S. Court House, Chicago, Illinois, at 2:45 p.m. on Friday, August 11, 1944, in the matter of the income tax liability to the United States of Theodore W. Goldstein.

Present:

Mr. Stanley A. Wodrick, witness;

Mr. Alfred W. Fleming, special agent in charge;

Recorder: Helen Stähl.

Q. Mr. Wodrick, will you please raise your right hand? Do you swear that the testimony you are about to give in the matter of the income-tax liability to the United States of Theodore W. Goldstein will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. Will you please state your name and address?

A. My name is Stanley A. Wodrick, 5834 Gunnison Street.

Q. Where are you employed, Mr. Wodrick?

A. With the Collector of Internal Revenue, U. S. Court House, Chicago, Illinois.

Q. What is your official title?

A. Zone deputy collector.

Q. How long have you acted in that capacity?

A. Since February 1941.

Q. I will hand you herewith a memorandum dated April 17, 1944, addressed to Edward Schultz, Division Chief, Northwest Division Office, by Daniel J. Conerty, Chief Field Deputy, which reads, in part, as follows: "An anonymous telephone communication received in this office during the past filing period stated that the income from the building at 3432 Lawrence Avenue is not reported by anybody and supposedly the rents are paid by the different organizations occupying the property to a William Goldstein, who claims he is agent for Theodore Goldstein." Was this memorandum assigned to you for investigation?

A. Yes, it was.

61 Q. Will you kindly tell us, in your own words, exactly what steps were taken by you in the investigation of this matter?

A. Shortly after April 17, 1944—the exact date is unknown at this time—I made a personal call at the Hines Realty Company, 3424 Lawrence Avenue, Chicago, Illinois, and asked to see Mr. Frank Sampson, who is president of said company. The anonymous communication has the address 3432 Lawrence Avenue, which is incorrect. It should be 3424 Lawrence Avenue. I asked to see the lease between the Hines Realty Company and William Goldstein, who supposedly received rent income from the Albany Park Bank Building, 3424 Lawrence Avenue. The lease was signed by William Goldstein as agent for Theodore Goldstein. My next step was to contact Mr. William Goldstein, 140 North Dearborn, on or about May 12, 1944. At that time I asked Mr. Goldstein who the owner of the building at 3424 Lawrence Avenue was. His reply was: "I do not know the owner." He then asked me the reason for this investigation. I had explained to him that rent received from the Albany Park Bank Building had not been reported by anyone and it was discovered that he,

William Goldstein, was acting agent for Theodore Goldstein. Mr. William Goldstein objected to that, saying that Theodore Goldstein was not the owner of the building, but merely title owner of record; and to confirm that statement, Mr. William Goldstein and I went to the County Building and checked the title. We found a photostatic copy—I think it was dated July 17, 1937—showing the name of Theodore Goldstein as the owner. I explained to Mr. William Goldstein that, since the title shows Theodore Goldstein as the owner, he was the person who was to report rents received from the Albany Park Bank Building, 3424 Lawrence Avenue, in his income-tax returns for the years 1937 through 1943. Mr. William Goldstein objected to that, stating that Theodore Goldstein was not the actual owner. However, after a few days, Mr. William Goldstein agreed to have the returns prepared for Theodore Goldstein, showing rent income from the Albany Park Bank Building for the years 1937 through 1943. Mr. William Goldstein said that the reason he was agreeing or wanted to agree and prepare these returns for his son, Theodore Goldstein, was that he would like to have the matter closed as soon as possible. I have prepared income tax returns, Form 1040, for the years 1937, 1938, and 1939, showing no tax due. I have also requested copies of transcripts of income tax returns for 1940 through 1943, and these are in the process of completion, for Theodore Goldstein.

Q. When you first contacted Mr. William Goldstein in regard to the ownership of the Albany Park Building, did I understand you to say that Mr. William Goldstein declared he did not know who owned that property?

A. That is right.

62 Q. What else did William Goldstein say at that particular time in regard to the collection of rents or the ownership of that property?

A. He was rather surprised to hear a question as that as to who was the owner of the building. He said it was all a part of court record and the testimony previously given, and he also stated that he received money from persons unknown for the purchase of that building. He also stated that he didn't know whether it was Skidmore's or Johnson's money. I also asked Mr. William Goldstein the purpose of placing the title in Theodore Goldstein's name, and he replied that at one time William Johnson had an idea of opening a bank, to be located in the building

at 3424 Lawrence Avenue, known as the Albany Park Bank Building, and he did not want to disclose the identity of the owners of the building to the people in the neighborhood. I asked Mr. Goldstein whether the rent money was held in an account for the purpose of returning that money to the person or persons to be later identified as the owners of the building. Mr. Goldstein replied that he merely kept the money, but did not have a special account for that purpose.

Q. Why did you ask Mr. William Goldstein who is the owner of the Albany Park Bank Building property?

A. My reason for asking that question was to ascertain the person liable for income tax based on rental income received from the tenants of the Albany Park Bank Building.

Q. Did you tell Mr. William Goldstein that the income received from the Albany Park Bank Building should be reported on the income tax returns of Theodore Goldstein, since he was the owner of record?

A. Yes, I did.

Q. What was William Goldstein's reply to that?

A. He stated that Theodore Goldstein was not the owner and that he was the title owner of the record and, as such, could not be held liable for the tax.

Q. Then what happened?

A. At that time I explained to Mr. Goldstein that, since the title shows the name of Theodore Goldstein, he was the individual or person who should report the income received from the building.

Q. Did William Goldstein agree to this?

A. The first time he was approached on the subject, he disagreed, stating that Theodore Goldstein was not the actual owner. However, after a few days, I called on William Goldstein and at that time he agreed to have the returns prepared in the name of Theodore Goldstein.

63 Q. He agreed to have the rental income from the Albany Park Bank Building reported on the income tax returns to be prepared for Theodore Goldstein. Is that correct?

A. Yes, that is correct.

Q. Then, I understand that you did prepare delinquent income tax returns for Theodore Goldstein for the years 1937 through 1939, inclusive. Is that correct?

A. Yes, I did.

Q. And you reported thereon net income from the Albany Park Bank Building for the year 1937 \$1,046.86, for the year 1938 \$340.09, and for the year 1939, a loss of \$1,115.60. Incidentally, there is no tax due on any of those returns?

A. That is correct.

Q. As I understand the matter, you have an engagement to meet Mr. William Goldstein at some later date in regard to the preparation of either delinquent or amended returns for Theodore Goldstein for the years 1940 to 1943?

A. Yes, I have. It is August 12, 1944.

Q. Did you tell William Goldstein that you proposed to report approximately \$60,000 income on Theodore Goldstein's 1937 income tax return as being income received in that year on the purchase of the Albany Park Bank Building?

A. Yes, I did.

Q. What did Mr. William Goldstein say in regard to that?

A. He disagreed very strenuously to the extent that he stated that he did not think that any court in the country would uphold the assessment.

Q. Did he simplify that statement in any way?

A. Yes, he stated that, since the money had never been received by Theodore Goldstein, he did not see how we could proceed on the basis that \$60,000 was income to Theodore Goldstein for the year 1937.

Q. I will hand you herewith an unsigned and undated typewritten memorandum which reads, in part, as follows: "I have acted as attorney and agent for my son, Theodore, the owner, in the management of the property located at 3424 Lawrence Avenue, Chicago, Illinois, purchased for my son, Theodore, in 1937."

A. Yes, I have.

64 Q. Was this statement in your possession at any time?

A. Yes, it was.

Q. How did it come to be in your possession?

A. It was given to me by Mr. Edward H. Schultz, Division Chief of the Northwest Division Office.

Q. Do you remember when it was given to you?

A. I did not receive the statement with the original assignment. The approximate date that I did receive the statement was about a week prior to June 13, 1944.

Q. What did Mr. Schultz say to you at the time he handed you this memorandum?

A. He said that he wanted Mr. William Goldstein to sign the statement.

Q. Did Mr. Schultz explain why he wanted this statement signed by William Goldstein?

A. I do not recall Mr. Schultz' giving me a reason for having this statement signed by William Goldstein.

Q. Did you ask him to sign this memorandum?

A. Yes, I did.

Q. What was said at that time by Mr. William Goldstein?

A. He stated he could not sign a statement like that.

Q. Did he give any reasons as to why he could not sign this memorandum?

A. Yes, he did.

Q. Will you tell us, in your own words, what Mr. William Goldstein said in regard to this matter?

A. He objected to the words contained in the memorandum, namely: "the owner" and "purchased for my son, Theodore, in 1937."

Q. Do those words appear in the first paragraph of this memorandum?

A. Yes, they do.

Q. What did you then do in regard to this subject?

A. It was then suggested to Mr. William Goldstein that he word his own statement—one that he thinks would be suitable—and properly sign it.

65 Q. Who made that suggestion to Mr. William Goldstein?

A. Mr. Edward H. Schultz.

Q. The Division Chief?

A. Yes.

Q. Was that at a conference in Mr. Schultz' office, attended by you and Mr. William Goldstein?

A. Yes, it was.

Q. Were any other persons present?

A. No.

Q. I will hand you a letter addressed to the Honorable Carter H. Harrison, Collector, U. S. Court House, Chicago, Illinois, dated June 13, 1944, signed "William Goldstein," which reads, in part as follows:

"Reference is made to rental income from property located at 3424 Lawrence Avenue, Chicago, Illinois, which has not been reported in income tax returns by my son,

Theodore Goldstein, title owner of record, and which was received by me as agent." Is this the statement dictated and signed by William Goldstein?

A. Yes, this is the statement.

Q. Attached to the delinquent income tax returns prepared for Theodore Goldstein for the years 1937 to 1939, inclusive, is a report addressed to Daniel J. Conerty, Chief Field Deputy, under date of July 15, 1944, signed by Stanley A. Wodrick, setting forth the income from the Albany Park Bank Building, which you have set up as income to Theodore Goldstein as title owner of record of said building. Is this your report on that matter, Mr. Wodrick?

A. Yes, it is.

Q. Is that your signature?

A. It is.

Q. Is there any further statement you would care to make in connection with this matter which has not been covered by questions and answers?

A. No.

United States of America)
Northern District of Illinois) ss.

I have carefully read the foregoing statement, consisting of six pages, which is a transcript of questions which were propounded to me and my answers to such questions, on the 11th day of August, 1944, at Chicago, Illinois, 66 relative to the income tax liability to the United States of Theodore W. Goldstein.

I hereby certify that the foregoing answers are true and correct, that I have made the corrections shown and have placed my initials opposite each correction, and that I have initialed each page of the statement.

(signed) Stanley A. Wodrick.

Subscribed and sworn to before me at 3:35 PM this 12th day of August, 1944, in Room 284, U. S. Court House, Chicago, Illinois.

(signed) Alfred W. Fleming.

67

GOVERNMENT'S EXHIBIT NO. 4.

State of Illinois)
County of Cook) ss:

AFFIDAVIT.

I, Stanley A. Wodrick, Deputy Collector of the Internal Revenue Department, upon oath, being duly sworn, depose and say as follows:

I am the same Stanley A. Wodrick who subscribed and swore to a question and answer statement, dated August 12, 1944, which statement was made in Room 284, United States Court House, Chicago, Illinois, before Alfred W. Fleming, Special Agent in Charge at Philadelphia, Pennsylvania, of the Intelligence Division of the Bureau of Internal Revenue, Treasury Department. This statement consists of seven pages and embraces my answers in response to questions propounded to me by Mr. Fleming in the presence of a stenographer named Helen Stall. I understand that this question and answer statement will be filed by the Government in its Answer to the Defendants' Amended Motion for New Trial in the case of *United States of America v. William R. Johnson, et al.*

I have examined this statement and wish to make a correction of a portion of it. On Page 3 of this statement, in response to the question:

"What else did William Goldstein say at that particular time in regard to the collection of rents or the ownership of that property?"

it appears from this statement that I answered, as follows:

"He was rather surprised to hear a question as that as to who was the owner of the building. He said it was all a part of Court record and the testimony previously given, and he also stated that he received money from persons unknown for the purchase of that building."

68 What I meant and intended to say at that time was that Goldstein stated to me that he did not know whose money it was that he had received for the purchase of that building. At no time did I ask Mr. Goldstein who gave him the money for the purchase of that building and

at no time did he say that unknown persons gave him the money to purchase that building.

(signed) Stanley A. Wodrick.

Subscribed and sworn to before me this 7th day of December, A. D. 1944.

(signed) Anna L. Minahan,
Notary Public.

69

GOVERNMENT'S EXHIBIT NO. 5.

State of Illinois, }
County of Cook. } ss.

Edward H. Schulz, being first duly sworn on oath deposes and says:

That he is Division Chief in Charge of the Miscellaneous Tax Squad of the Field Division of the Treasury Department, Internal Revenue Bureau, Room No. 1, United States Court House, Chicago, Illinois; that in the latter part of April, 1944, he was Division Chief in Charge of the Northwest Division Office of the Field Division of the Treasury Department, Internal Revenue Bureau, located at 3256 North Pulaski Road, Chicago, Illinois. That in the latter part of April, 1944, he received an assignment from the Chief Field Deputy to institute an investigation for the purpose of determining the identity of the persons interested in or receiving income from a building located at 3424 Lawrence Avenue, Chicago, Illinois. That pursuant to this assignment, he instructed Stanley A. Wodrick, a deputy collector, attached to affiant's office, to conduct such an investigation; that thereafter, and during the course of such investigation, affiant had conversations on three or four occasions with William Goldstein relative to the interest, if any, of Theodore Goldstein in the property at 3424 Lawrence Avenue, Chicago, Illinois. In these conversations William Goldstein at all times stated that Theodore Goldstein was the title owner of record of the property at 3424 Lawrence Avenue, Chicago, Illinois only and was not the actual owner of this property. He was very definite in making this fact understood. As Division Chief this affiant told Mr. Goldstein that Theodore Gold-

stein, as title owner of record, was required to file income tax returns on this property even though the claim was made that Theodore Goldstein was not the actual owner of the property.

70 Affiant further states that subsequent to the first conversation with William Goldstein relative to the property at 3424 Lawrence Avenue, and after William Goldstein had informed me that Theodore Goldstein was title owner of record only, affiant received a communication in the form of typewritten suggestions from the office of the Chief Field Deputy, a copy of which typewritten suggestions is attached to this affidavit. That affiant requested William Goldstein to sign an affidavit embracing the suggestions contained in these typewritten suggestions forwarded to me. That William Goldstein read the typewritten suggestions forwarded to me and then stated that he would not sign any affidavit containing any statement that his son Theodore was "the owner" of the property located at 3424 Lawrence Avenue, Chicago, Illinois, or containing any statement that he purchased that property for his son, Theodore. At that time William Goldstein reiterated his statement that his son Theodore was not the owner of that property but was merely the title owner of record.

Affiant further sayeth not.

(signed) Edward H. Schulz.

Subscribed to and sworn to before me this 7th day of December, A. D. 1944.

(signed) Anna L. Minahan,
Notary Public.

71 GOVERNMENT'S EXHIBIT NO. 5A.

I have acted as attorney and agent for my son Theodore, the owner in the management of the property located at 3424 Lawrence Avenue, Chicago, Illinois, purchased for my son Theodore in 1937. For several years the premises were operated by Theodore Goldstein under the name Albany Park Safe Deposit Vault Company.

In 1941 Theodore entered into a lease with the Hines Realty and Construction Company, the terms being \$250.00 per month.

During the early part of 1944 a new lease was entered into with Frank Sampson with provision that if a bank is operated on the premises the rental would be \$300.00 per month.

I have received the monthly rental payments from January 1942 to present time from Frank Sampson, as President of Hines Realty and Construction Company in the form of checks made payable to me as agent. I endorsed the checks received and gave the currency to my son Theodore.

As Attorney and Agent, for my son Theodore, I am authorized by him to make payment to the Collector of Internal Revenue the amount of tax owed by him because of his failure to pay the income tax due on the income received by him from this property.

My son Theodore is at the present time a member of the armed forces of the United States.

Filed
Dec. 11,
1944

72 On the 11th day of December, 1944, the defendants filed a notice and the defendants' reply to Government's answer to the amended motion for a new trial, and affidavit of the defendant, William R. Johnson attached thereto, which said notice, defendants' reply and affidavit were in words and figures as follows, to-wit:

73 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 32,168) * *

NOTICE..

To:

Hon. J. Albert Woll,
United States Attorney,
450 U. S. Court House,
Chicago, Illinois.

Please Take Notice that the defendants are this day filing their Reply to Government's Answer to Defendants' Amended Motion for New Trial in the Office of the Clerk of the District Court of the United States, for the North-

ern District of Illinois, Eastern Division, a copy of which said Reply is hereto attached for your convenience.

Dated at Chicago, Illinois, this 11th day of December, 1944.

(sgd) *Homer Cummings*
Homer Cummings

(sgd) *William J. Dempsey*
William J. Dempsey

Attorneys for William R. Johnson,
Defendant

(sgd) *Harold R. Schradzke*
Harold R. Schradzke

Attorney for Jack Sommers, James
A. Hartigan, William P. Kelly
and Stuart Solomon Brown, De-
fendants.

Received a copy of the above Notice and Reply therein referred to this 11th day of December, 1944.

J. Albert Woll

United States Attorney
by J. M. Webster

74 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

(Caption—No. 32168)

Filed
Dec. 1
1944

REPLY OF DEFENDANTS TO GOVERNMENT'S
ANSWER TO DEFENDANTS' AMENDED MOTION
FOR NEW TRIAL.

This matter is now before this Court pursuant to an order of the Circuit Court of Appeals reopening the proceedings on defendants' motion for new trial and remanding the case to permit the filing and consideration of an amended motion for a new trial. The basis for the Circuit Court of Appeals' order was the admission by the Government that William Goldstein procured and filed certain income tax returns signed by Theodore Goldstein

the contents of which prove that William Goldstein gave false testimony at the trial of this case and that his affidavits submitted by the Government in opposition to defendants' Motion For a New Trial contain false averments.

The principal ground upon which defendants' original motion for new trial was predicated was that Goldstein testified falsely at the trial of these cases and that his false testimony resulted in prejudice to the defendants, depriving them of a fair trial, and that therefore their conviction violated constitutional requirements for a fair trial. The uncontradicted evidence in support of defendants' Motion For a New Trial showed:

(a) That Goldstein had a compelling twofold motive for testifying falsely: (1) to protect his friend and client Skidmore from criminal and civil tax liability (for which purpose the Government admits he committed perjury on at least one other occasion); (2) to obtain immunity from prosecution for perjury and to escape disbarment (which immunity he has obtained, as he has obtained protection from disbarment, through the offices of the United States Attorney);

(b) That on numerous occasions *under circumstances which preclude any possibility of collusion* for the purpose of obtaining a new trial for defendants, Goldstein had made admissions which proved his testimony to have been false;

(c) Many undisputed facts which were not merely inconsistent with Goldstein's testimony but were utterly irreconcilable with it, and

(d) Facts and admissions utterly impeaching Goldstein's credibility.

This proof was deemed insufficient by this Court (a) on the ground that it did not include a formal affidavit of recantation by Goldstein,¹ and (b) on the ground that defendants submitted no affidavit of a third party containing a statement "Johnson did not give Goldstein

the money to purchase the various pieces of property."²

¹ An affidavit of recantation by a self-confessed perjurer has been uniformly held to be the least credible of all testimony. *Dale v. United States*, 66 F. 2d 666; *Harrison v. United States*, 7 F. 2d 259.

² See R. 476, 483, 485, 490, 491, 492. (These and subsequent references to "R" are to the printed record on appeal filed as Exhibit A to defendants' motion for a new trial.)

We will not here reargue at length the reasons why the evidence submitted in support of the original motion for new trial standing alone amply justifies the granting of a new trial. It is no longer necessary to do so in view of the tax returns filed by William Goldstein on behalf of his son Theodore. However, we waive none of the arguments in that respect.³

1. THE THEODORE GOLDSTEIN DELINQUENT AND AMENDED TAX RETURNS FOR 1937 THROUGH 1943 PROVE THE FALSITY OF WILLIAM GOLDSTEIN'S TRIAL TESTIMONY.

The undisputed facts with respect to the Albany Park Bank Building.—The undisputed testimony at the trial and on the original motion for new trial shows:

The building was purchased by Goldstein from a receiver in July, 1937. Title to the building was transferred at the same time to his son Ted Goldstein (R. 151-152). Ted Goldstein immediately leased part of the premises to the Albany Park Safe Deposit Vault Company (R. 153-154). In September, 1941, Goldstein as agent for his son Theodore leased the building to the Hines Realty & Construction Company, hereafter referred to as the "Hines Company", of which Frank Sampson was and is president⁴

³ Supplementing the cases cited (R. 320-327) in support of the contention that the Court of Appeals finally determined certain of the issues raised by the Government again on the original motion for new trial, we respectfully call this Court's attention to *Checker Cab Co. v. Markland*, 142 F. 2d 95.

⁴ Attached to the Amended Motion for New Trial is a copy of a new lease of the same property for a period of ten years beginning October 1, 1946, and executed January 3, 1944 by Theodore Goldstein. This exhibit (Ex. E-2) shows that even on that late date Theodore was purporting to act in no capacity other than that of owner. Sampson, president of the Hines Company prepared this lease and submitted it to William Goldstein at the latter's suggestion (Defs'. Ex. E-1, p. 2). In submitting the lease Sampson: "Explained to William Goldstein that it would also be necessary for me to have the lease signed by his son, Theodore Goldstein, who was the owner of the property rather than William Goldstein, as agent * * *". Pursuant to this request William Goldstein procured the signature of his son as lessor and presented it to Sampson on January 3, 1944 (Ex. E-1, p. 3). None of this is denied by Goldstein in his affidavit submitted by the Government as an exhibit to its answer (Gov't Ex. 1).

77 (R. 202-204). Since that time Goldstein has collected the rents of \$250 (and commencing in October, 1943, \$300) per month under this lease and has cashed the rent checks for his private account after endorsing them "William Goldstein, Agent" and then "William Goldstein" (R. 199, 200-201). In July, 1943, the County Treasurer instituted a tax receivership proceeding against the property (R. 198-199). At the insistence of the County Treasurer's office, Goldstein took out and paid for insurance covering the property, the premium on which was more than \$300 (R. 206, 207-212).

Goldstein's trial testimony that Johnson was owner.—Despite these undisputed facts Goldstein at the trial unequivocally asserted that he bought this building "for Johnson" and this Court so understood his testimony. Goldstein's testimony was (R. 517-518):

"I was requested by Mr. Johnson to go out there and purchase the (Albany Park Bank) building for him. * * * I purchased that property at the request of Mr. Johnson. * * * Title to that property was taken in the name of Ted W. Goldstein, my son. Subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son. This Albany Park Building property was purchased July 16, 1937."⁵

78 This Court accurately paraphrased this testimony as follows (R. 512):

"Goldstein testified on the trial that he purchased this property for Johnson and paid for it with currency given him by Johnson; that he took title in the name of his son Ted Goldstein, and subsequently caused a quit-claim deed to be delivered to Johnson."

The tax returns conclusively show that Goldstein did not purchase the property for Johnson and that Johnson has never been the owner.—The tax returns signed by Theodore Goldstein for the years 1937-1943 (Exhibits C-1—C-7, inclusive) were filed for him, and the tax thereon paid by William Goldstein as agent for his son Theodore.

⁵ It is to be noted that this testimony at the trial does not permit of the hair-splitting distinction hitherto urged by the Government in this and other courts that Goldstein did not testify that he bought the property for Johnson. Indeed, this Court epitomized this trial testimony as follows (R. 512):

"Goldstein testified on the trial that he purchased this property for Johnson * * *"

(Gov't Exhibit on Amended Motion for New Trial, No. 2, p. 3; No. 2 (b)).

The returns (Exhibits to Amended Motion for New Trial, Ex. Nos. C-1—C-7) conclusively show that Theodore Goldstein by his solemn statements⁶ has *admitted* ownership of the Albany Park Bank Building in returning the rentals thereon as taxable to him. But he has gone further. By claiming deductions for depreciation thereon, and, in years of loss, by offsetting such loss against his income from other sources (see Ex. C-4 for 1940) he has affirmatively asserted in himself an interest in the property which is not less than complete legal and equitable ownership. The asserted right to depreciation as owner is shown in Schedule E of the 1937 return to have arisen in July, 1937, the date as of which the property is stated to have been acquired by the taxpayer (Def's' Ex. C-1 to Amended Motion for New Trial, p. 3). The same schedule also shows that the taxpayer claimed depreciation from July 1, 1937. The date of the deed to Theodore was July 6, 1937 (R. 151-152), actual delivery may not have been until July 16 (R. 518). Continuity of complete ownership of the property is thus claimed by Theodore from the date of its acquisition by William.

79 Theodore thus unequivocally contradicts the testimony of William at the trial that he purchased the property for Johnson. He even more clearly repudiates William's testimony at the trial that "there was a quit claim deed delivered to Mr. William R. Johnson by my son" (R. 518).

William Goldstein by filing the returns has admitted his trial testimony to be false.—William Goldstein is conceded to have had full knowledge of these returns and to have actively participated in their execution and filing. As agent for Theodore, William Goldstein had authority to make payment of "any tax owed by him" (Gov't Ex. 2(b) on Answer to Amended Motion for New Trial). The deputy collector prepared the returns after conferences with William as agent and William procured Theodore's signature, returned the returns to the deputy collector's office and paid the tax thus indicated (Gov't Ex. 2, p. 3).

⁶ Oaths, required on returns in 1937-1941, were subject to penal sanction (18 U.S.C. Sec. 231); affirmations to the returns for 1942 and 1943 were subject to the same sanctions (26 U.S.C. Sec. 145 (c)).

Goldstein certainly knew all the facts concerning the purchase and ownership of the Albany Park Bank Building. Being subject to the same penal sanctions if the returns are false, he is, equally with Theodore, chargeable with the admission and assertion of ownership contained in the returns, and these returns clearly show that William Goldstein lied when he testified on the trial that he purchased the property "for Johnson", and that Ted Goldstein "subsequently caused a quit-claim deed to be delivered to Johnson" (R. 517-518, 512).

Yet, by the affidavits of Goldstein on the original Motion for New Trial submitted and vouched for by the Government, this Court was led to say that it does—

"not believe that he (Goldstein) perjured himself on the trial and, on the contrary, believes that he was quite circumspect" (R. 515).

Surely this Court cannot longer thus be imposed upon. We may concede that Goldstein's testimony was circumspect in its watchfulness to avoid statements easy to prove perjured; possibly "circumvolution" would be a more accurate description for the sinuous course of his testimony in affidavits throughout this case. In any event, no one can disagree that the solemnly affirmed returns show that William Goldstein did commit perjury.

2. THE THEODORE GOLDSTEIN DELINQUENT AND AMENDED TAX RETURNS FOR 1937 THROUGH 1943 PROVE THE FALSITY OF WILLIAM GOLDSTEIN'S AFFIDAVITS ON THE ORIGINAL MOTION FOR NEW TRIAL.

On the original motion for new trial the Government was faced with an array of affidavits showing action and statements by Goldstein consistent only with ownership in Theodore Goldstein and at war with the testimony of William Goldstein: (a) that he had purchased the Albany Park Bank Building "for Johnson" (R. 517-518, 512); and (b) that "subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son" (R. 518).

The affidavits on motion for new trial asserted that title to the bank building and the rental moneys were both held in trust for Johnson.—To meet the defendants' ample showing of assertion and exercise of powers of ownership by William Goldstein over rental moneys and by William Goldstein as agent of Theodore with respect to the prop-

erty, the device was adopted of asserting that Theodore Goldstein holds title to the building in trust for William R. Johnson and that the rents on the building which were, as shown above, admittedly paid to William Goldstein (p. 4, *supra*) were by him being held as income of Johnson (R. 252-253).

Goldstein on the original motion did not deny the leasing of the property to the Hines Company nor that he has collected and cashed for his own account the rent checks paid by that company under such lease. However, he attempted to explain his ownership by swearing that the rent money—

“is being held by me until such time as I am released from the Internal Revenue Department which served me with a lien to hold all funds and property belonging to William R. Johnson” (R. 252)..

The same affidavit of Goldstein on the original motion for new trial also stated (R. 253):

81 “Theodore W. Goldstein holds title to the building in trust. The reason that title was not transferred to William R. Johnson was that he requested me to let title remain in my son as he intended to organize a bank sometime in the future and did not want his name connected with it.

“During the years '38 and '39 Mr. Johnson inquired of me how the income was taken care of in reference to income tax—as to whether or not he should report it. I explained to him that the corporation is getting the benefits of the entire income and making all the expenditures and the Albany Park Safe Deposit Vault Company, a corporation, filed their income tax returns every year up to the time Mr. Frank Sampson took possession of the premises.”
(Emphasis supplied)

This theory that he and his son were trustees or agents for Johnson was advanced by William Goldstein to justify his activities with respect to the property and retention of the rent moneys in his own name, otherwise explainable only on the theory that he, or Theodore his son, was the real owner of all interest in the property. The veracity of the sworn statement of William that he held the rent money under an Internal Revenue Bureau lien, submitted as it was by the United States Attorney, was thus vouched for by the Government which presumably had full knowl-

edge of its liens and moneys covered by them. With this implied endorsement by the Government itself, this Court apparently accepted the explanation of Goldstein and the Government for it was on this same theory of trust that this Court rationalized the 1941 lease between Theodore Goldstein as lessor and the Hines Company as lessee by holding (R. 512):

"The lease now offered merely shows that in 1941 Ted Goldstein continued to act for whomsoever he represented and adds nothing to what was before the jury."

This Court's denial of the motion for new trial was thus based in part on the acceptance of Goldstein's affidavit that he and his son held as trustees for Johnson.

82 *The tax returns of Theodore Goldstein made under penal sanctions show that William Goldstein committed perjury on the original motion for new trial.*—Both William and Theodore Goldstein are, as shown above, equally responsible for the truthfulness of the representations contained in the tax returns of Theodore Goldstein and that responsibility is, as shown above, enforced by penal sanctions equally grave to each. Yet, by these returns, it is recognized and affirmed that since the date William Goldstein paid the purchase price for the Albany Park Bank Building, that property has been owned by Theodore in his individual capacity, the income therefrom has been his individual income, the real estate taxes thereon are an expense personal to him, depreciation thereon is an exhaustion of an investment owned by him and any income from the building is under applicable law exempt from income taxes in an amount measured by the statutory exemption personal to him. These necessary implications, basic as they are to the computations shown on the returns, are common knowledge even among laymen. Certainly William Goldstein, a lawyer of some 25 years experience, and his son, Theodore, also a lawyer, cannot plead ignorance of applicable elementary principles of law which necessarily attach to the returns as sworn.

There never has been any explanation offered as to how Ted Goldstein, who according to Goldstein's testimony on the trial executed a quit-claim deed of the property to Johnson (R. 518) could nevertheless hold title to the building as trustee, as Goldstein subsequently swore he did in his affidavit in opposition to the original motion for new trial (R. 253).

The returns because of their necessarily implied assertion of complete beneficial ownership in Theodore Goldstein, demonstrate to have been false the affidavits offered by the Government on the original motion for new trial to the effect that the moneys received by way of rental are (R. 252-253):

"being held by me (William Goldstein) until such time as I am released by the Internal Revenue Department which served me with a lien to hold all funds and property belonging to William R. Johnson * * *. Theodore W. Goldstein holds title to the building in trust. The reason the title was not transferred to William R. Johnson was that he requested me to let title remain in my son as he intended to organize a bank some time in the future and did not want his name connected with it."

83 The returns make it impossible for either of the Goldsteins to longer contend that the property has from the beginning been owned beneficially by anyone other than Theodore, or that Theodore in holding title to the property, leasing it and incurring the liabilities and expenses of ownership has been acting for any person other than himself. Neither may it be seriously contended that William Goldstein in retaining the rental moneys did so in a capacity other than that in which the evidence shows he purported to act in receiving it—as agent for Theodore.

Obviously, this Court was misled by the affidavits of Goldstein on the original motion for new trial in holding that the lease by Theodore in 1941 merely showed that—

"Ted Goldstein continued to act for whomsoever he represented and adds nothing to what was before the jury."

It now appearing from Theodore's own returns that he was acting and continued to act for himself alone in executing the lease, the execution of the lease, in which William acted as agent for Theodore, constituted an admission by the latter that he had not purchased the property for Johnson.

The uncontradicted evidence in the record summarized under Points 1 and 2 above is completely consistent with the necessary assertion of ownership, legal and equitable, of the Albany Park Bank Building and in Theodore Goldstein with his receipt as his personal income of the rents of that building. It is completely inconsistent with the

attempted avoidance in the affidavits of Theodore and William Goldstein submitted as Exhibits 1 and 2 to the Government's opposition.

3. THE BUREAU OF INTERNAL REVENUE ON THE FACTS PRESENTED FINDS THEODORE GOLDSTEIN THE ACTUAL OWNER OF THE ALBANY PARK BANK BUILDING SINCE JULY, 1937, AND THAT RENTS OF SAID BUILDING WERE PERSONAL INCOME TO HIM.

If further demonstration of the fact of Theodore's ownership of the property and his receipt of the rents 84 as his personal income be needed, it is to be found in Exhibits 3 and 5 submitted as part of the Government's opposition. These exhibits show that the facts with respect to the purchase, maintenance, management and operation of the Albany Park Bank Building from the date of its purchase in 1937 to the present, the leasing of the premises, the collection of rents thereon, the comingling of rent moneys with Goldstein's other funds,⁸ the failure to file information returns which would have been required had William Goldstein not been collecting the rents on behalf of himself or his son Theodore (26 U.S.C. sec. 147 (a); Treas. Regs. 111, sec. 29.147-1), the failure to file any returns showing receipt of this income as fiduciary by either Theodore or William Goldstein (26 U.S.C. sec. 142), and the failure of William Goldstein to name the person for whom he purported to hold the money, Gov't Ex. No. 3, p. 2, on Amended Motion for New Trial (26 U.S.C. sec. 147 (c); Treas. Regs. 111, sec. 29.147-B), all taken together caused Stanley A. Wodrick, Deputy Collector, Edward H. Schulz, his supervisor, and Alfred W. Fleming, Special Agent in Charge, Intelligence Unit, Bureau of Internal Revenue, Philadelphia (Gov't Ex. No. 3, p. 4 Answer to Amended Motion), to concur in the obviously necessary conclusion that the rent income on this property was taxable as the personal income of Theodore Goldstein. On the basis of these facts they rejected Goldstein's absurd contention that Theodore Goldstein had merely held record title to the property and determined that an assessment against Theodore Goldstein should be made unless he paid personal income taxes on the rental in-

⁸ An act hardly consistent with the existence of either an agency or trustee relationship on the part of either of the Goldsteins. See *People v. Hachtman*, 350 Ill. 326, 329.

85 come. To the weight of this conclusion of the Bureau of Internal Revenue there is to be added the conclusion of William and Theodore Goldstein themselves that the liability existed, as evidenced by their filing of the returns and payment of the tax.

Any possibility that Goldstein might have evaded payment of taxes on this property on the theory that he and Theodore were agents for some hitherto undisclosed principal was completely eliminated by Goldstein's claim that he does not know now and never did know who the real owner of the property was (Gov't Ex. No. 3, pp. 2, 3, Answer to Amended Motion). No agency relation can be created without a principal, or consent both by the principal and the agent. It seems hardly necessary to add that Goldstein as a lawyer of over twenty-five years' experience would not subject himself to the potential liabilities attendant on management of property, including the leasing of such property for long terms, without specific authority from the real owner. It is significant also to note that Goldstein's attempt, not only in his trial testimony but in his affidavits submitted by the Government on the original motion for new trial, to place ownership of the rent income in Johnson was completely abandoned. Instead, when he was approached by an agent of the Bureau of Internal Revenue seeking to collect a tax on the rental income he said that he did not know who the owner was. Obviously had Goldstein told the tax collector that the money belonged to Johnson against whom a heavy assessment for allegedly delinquent taxes is outstanding, he would have been required to turn over all the rent money forthwith and any question of payment merely of the taxes would have been submerged in the seizure of all of the income. Goldstein's willingness to swear falsely to Johnson's ownership went all the way to the point where it would cost him money to persist, but he evidently thought that a requirement that he give up all of the income collected on the Albany Park Bank Building would be too high a price to pay for further persistence in his perjury.

86 4. THE GOVERNMENT'S ANSWER DOES NOT DENY, AND IT IS THEREFORE ADMITTED, THAT THEODORE GOLDSTEIN HAS BEEN SINCE JULY, 1937, THE ACTUAL OWNER OF THE BUILDING AND THAT THE RENTS THEREFROM ARE HIS PERSONAL INCOME.

The Government does not in its Answer attempt to deny that the Goldstein tax returns have in law and in fact the

meaning which we attribute to them in our amended motion for new trial. Its attempts to side-step the returns by the following esoteric pronouncement:

“* * * we believe that the circumstances under which the returns were filed were such as to dissipate any significant relevance the filing of the returns might otherwise have had” * * *

There can be no question of the relevance and significance of these returns and no circumstances of any kind under which they were filed can in any way “dissipate” their relevance. Nor can anything short of proof that the returns are false impeach them as evidence. Not only is no such proof offered; there is not the slightest hint of such a suggestion in the Government’s Answer. Obviously, if Theodore is not the real owner of the building, the taking of deductions for depreciation on the Albany Park Bank Building against his personal income constitutes a felony by both William and Theodore. If the year 1940 alone be considered, it is plain that this deduction was the instrument by which Theodore evaded payment of a tax on his personal income from sources not connected with the property. It is also obvious that, if Theodore did not receive the rent income as his own, he and William are guilty of a felony in having applied Theodore’s personal exemption and the exemption allowed to him as a member of the armed forces to reduce the tax on the return. 26 U. S. C. secs. 145

(b), 3793. Proof that Theodore is not the real owner 87 of the building and that he did not receive as personal income the rent from the building would establish guilt of both William and Theodore, not merely of a felony involving moral turpitude, but a felony involving false swearing. Any such proof would as effectively destroy Goldstein as a witness at the trial of these cases as does the abundant direct proof in this record that he testified falsely at the trial and swore falsely in his several affidavits submitted by the Government in opposition, both to the original and to the amended motion for a new trial. In short, under any possible view of the evidence or of the returns, Goldstein is shown to be an utterly irresponsible liar under oath.

5. THERE IS NO LEGAL BASIS FOR ACCEPTING GOLDSTEIN'S TESTIMONY SQUARELY CONTRADICTED BY OTHER WITNESSES.

The Government overreaches itself in asking this Court to reject as false the testimony of no less than 14 witnesses,⁹ who under oath squarely contradict Goldstein, in order to hold his testimony true. Nor can the testimony of 88 these witnesses be properly rejected on the ground of bias, past misdeeds, or other direct impeachment; as this Court attempted to do in its memorandum opinion on the original motion for new trial. For example, Henrichsen's evidence may not be rejected or even considered impeached on a mere hearsay statement that he was a participant in a crime. The Federal rule is that proof of con-

⁹ Compare:

Blockus Aff. No. 50 (R. 198) with Goldstein Aff., Gov't Ex. No. 15 (R. 263).

Englebreton Aff. No. 68 (R. 232) with Goldstein Aff., Gov't Ex. No. 1 (R. 243).

Fowler Aff. No. 53 (R. 213) with Goldstein Aff., Gov't Ex. No. 15 (R. 264).

Green Aff. Nos. 5, 18, 54 (R. 100, 125, 216) with Goldstein Aff., Gov't Ex. Nos. 1, 3, 15 (R. 243, 244, 264).

Guild Aff. No. 21 (R. 138) with Goldstein Aff., Gov't Ex. No. 7 (R. 251).

Hess Aff. No. 19 (R. 126) with Goldstein Aff., Gov't Ex. No. 5 (R. 248).

Holleran Aff. No. 20 (R. 128) with Goldstein Aff., Gov't Ex. No. 7 (R. 251).

Huscher Aff. No. 37 (R. 178) with Goldstein Aff., Gov't Ex. No. 11 (R. 260).

J. E. Johnson Aff. No. 58 (R. 221) with Goldstein Aff., Gov't Ex. No. 5 (R. 248).

Sampson Aff., Ex. "E-1" to Amended Motion for New Trial with Goldstein Aff., Gov't Ex. No. 2, Answer to Amended Motion for New Trial.

Schwefer Aff. No. 6 (R. 102) with Goldstein Aff., Gov't Ex. No. 3 (R. 244).

Sullivan Aff. No. 57 (R. 219) with Goldstein Aff., Gov't Ex. No. 7 (R. 251).

W. R. Johnson Aff. No. 69 (R. 233) with Goldstein Aff., Gov't Ex. No. 5 (R. 248).

viction is the only proper method of impeachment. *Glover v. United States*, 147 Fed. 426 (C. C. A. 8); *Coulston v. United States*, 51 F. 2d 178, 182 (C. C. A. 10); *Little v. United States*, 93 F. 2d 401, 407, 408 (C. C. A. 8). The disbarment of Green (R. 498); the possible animosity of Fowler (R. 497) because of a dispute at the time of leaving the employ of the Waukegan Post, the interest of defendant's brother, John E. Johnson (R. 479), the possible interest of Attorney Hess (R. 500) who formerly represented some of the defendants in this case, and indeed the interest of the defendant Johnson himself (R. 479), at most may be considered as impeaching only in testing comparative credibility. These considerations certainly cannot be used as a basis for the exclusion of the evidence itself. *Arnall Mills v. Smallwood*, 68 F. 2d 57, 59 (C. C. A. 5). Far more significant than any of such considerations in the evaluation of any witness' testimony is the element of disinterested corroboration. Henrichsen is minutely corroborated by not less than seventeen completely disinterested witnesses. Green is corroborated and Goldstein squarely given the lie by the completely disinterested Engelbretson. Hess, John E. Johnson, and defendant Johnson, were corroborated each by the other, and the Government itself not merely accepted Hess' version of the meeting in his office but actually filed an affidavit by him concerning it. Fowler is corroborated by the Lidschin and Wait affidavits in a statement which squarely contradicts Goldstein. On the state of the record to date, this Court cannot, and we are confident will not, accept Goldstein and reject as false the evidence of these witnesses.

89 6. THE GOVERNMENT'S AFFIDAVITS FILED BY THE GOVERNMENT IN OPPOSITION TO THE AMENDED MOTION ARE ENTITLED TO NO WEIGHT.

Goldstein's affidavit (Gov't Ex. No. 2) hardly deserves further comment.¹⁰ It may, however, be pointed out that in it he claims that Sampson, a witness whose prior affidavit, submitted by the Government (R. 315), and which

¹⁰ Attached hereto and hereby made a part hereof as Ex. F. is the affidavit of defendant Johnson reaffirming his trial testimony and categorically denying the allegations in Goldstein's testimony and in his affidavits as to interest in or participation by defendant Johnson in the Albany Park Bank Building.

this Court found truthful on the original motion for new trial (R. 493, 512), swore falsely in his affidavit submitted as Exhibit E-1 to the amended motion for a new trial. In particular, Goldstein denies admitting to Sampson "Johnson never had any interest in the (Albany Park Bank Building) property and has nothing whatever to do with it." (Gov't Ex. No. 2, def's. Ex. E-1.) The Government thus has the effrontery to ask this Court to find that Goldstein is telling the truth at the expense of holding fourteen different affiants guilty of swearing falsely.¹¹

Theodore Goldstein's affidavit, Exhibit I to the Government's answer, is of little consequence. It demonstrates that he did execute income tax returns asserting the ownership of the Albany Park Bank Building and the receipt by him as personal income of the rents collected, and that he did so upon being told by his father that an assessment against him would be made for the tax due if he failed to file these returns. His affidavit merely evidences a willingness on his part, in an attempt to protect his father from being proved a perjurer, to swear to matters wholly inconsistent with his sworn returns. It will be recalled that Theodore successfully evaded service of a subpoena issued at defendants' request during the trial (R. 343). Even

now, when, in defense of his father, he finally appears, 90 he is careful not to confirm William Goldstein's trial testimony to the effect that he (Theodore) delivered a quit-claim deed to Johnson. His tax returns most definitely negatives the possibility that a deed was ever delivered to Johnson. If this Court applies the same test of family relationship in weighing Theodore Goldstein's affidavit as it apparently did in rejecting John Elmer Johnson's affidavit on the original motion for new trial, nothing more need be said about it. With respect to both the Theodore and William Goldstein affidavits, however, it is not amiss to point out that both of these men are mature lawyers. They are charged with a knowledge of the law, not merely legally as a result of a technical presumption but also factually because they have been licensed to practice on the basis of their actual knowledge of it and have through experience since increased that knowledge.

¹¹ See footnote 9.

7. THE AFFIDAVIT OF EDWARD WAIT CANNOT BE SUM-
MARILY DISMISSED.

The Government in its answer seeks to brush off the affidavit of Edward Wait (Ex. D to Amended Motion for New Trial) with the statement that "it is certainly not newly discovered evidence." The record shows that Fowler while employed by the Waukegan Post was directed by Goldstein to solicit advertising and printing from the Bon Air Country Club, that he did so and that he had difficulty in collecting the bills for such work. This is sworn by Fowler and sworn to by Goldstein (R. 213, 263). Fowler swears further that Goldstein told him he would collect the bills through Skidmore and that shortly thereafter the bills were paid (R. 214). Goldstein denied this, swearing that he had instructed Fowler to retain an attorney to sue the Bon Air for these bills, that this was done and judgment was recovered for these bills (R. 264). The Government filed an affidavit by Max Lidschin, the attorney who handled litigation between the Post and the Bon Air in the Justice of the Peace Court in Lake County (R. 266).

91 The record shows that both Goldstein and Fowler swore that Fowler's connection with the Waukegan Post terminated in January 1941 (R. 213, 265). Lidschin's affidavit shows that he was requested by letter in September, 1941, to institute the proceedings, that the bill involved was for certain stationery which had even then not yet been delivered and that judgment was obtained for some fifty-seven dollars in October 1941 (R. 266-267). Wait's affidavit supplies what seemed to us to be evident, namely, specific proof that the order for the stationary which was the subject of the litigation was placed in April, 1941, some four months after Fowler left the Waukegan Post. And Wait's affidavit is supported by a copy of the actual bills showing the date of order.

It therefore appears from Wait's affidavit that the basis upon which this Court rejected Fowler's testimony and accepted Goldstein's was incorrect for it demonstrates that no litigation was ever instituted for the collection of any bills incurred by the Bon Air during any of the time that Fowler was with the paper. The proof that Goldstein's attempt to discredit Fowler's sworn statement was wholly false and fraudulent is highly important. The

reason Goldstein feared Fowler's testimony to the extent of trying through further false statements to discredit him is that Fowler squarely gives the lie to Goldstein's testimony concerning the purchase of the Bon Air Country Club. Fowler states unequivocally that Goldstein told him that he (Goldstein) had purchased the Bon Air for Skidmore with money given him by Skidmore (R. 213).

8. ESTABLISHED PRECEDENT REQUIRES THE GRANTING OF A NEW TRIAL.

A conviction for the crime of giving false testimony may be had on evidence showing merely the improbability of the testimony claimed to be false (*Schonfield v. United States*, 277 F. 934); and the testimony of one witness which is corroborated is sufficient to obtain a conviction for perjury (*United States v. Palese*, 133 F. 2d 600 (C. C. A. 3); *Holy v. United States*, 278 F. 521 (C. C. A. 7)). The testimony in support of the motion for new trial is clearly sufficient as a matter of law to demonstrate the falsity of Goldstein's testimony. As the Court of Appeals pointed out in *Larrison v. United States*, 24 F. 2d 82, proof for the purpose of a motion for new trial need only be sufficient to "reasonably satisfy" the court of the falsity of the testimony of a material witness. Obviously, none of the procedural or evidentiary safeguards upon which Goldstein might insist if he were on trial charged with the crime of perjury, are available for use by the Government against the defendants facing imprisonment because of Goldstein's false testimony. On the contrary, it is the defendants, facing imprisonment, who are entitled to the benefit of any doubt—not the Government or Goldstein who is not on trial (*Hamilton v. United States*, 140 F. 2d 679. See also *Arbuckle v. United States*, _____ F. 2d _____ (U. S. App., D. C.)) decided November 13, 1944. There can be no dispute, in the face of established precedent, that material false testimony given by a Government witness requires the granting of a new trial unless it affirmatively appears from the record that the false testimony was harmless error. *Larrison v. United States*, 24 F. 2d 82; *Pettine v. New Mexico*, 201 F. 489 (C.C.A. 8); *McCandless v. United States*; 298 U. S. 342, 347; *Little v. United States*, 73 F. 2d 861, 866 (C.C.A. 10); *Dressler v. United States*, 112 F. 2d 972 (C.C.A. 7); *Vicksburg and*

Exhibit F (Attached to Reply)

Meridian Railroad Co. v. O'Brien, 119 U.S. 104; *Miller v. Oklahoma*, 149 F. 330 (C.C.A. 8).

In conclusion defendants respectfully submit that upon all the evidence before this Court the conclusion is inescapable that Goldstein testified falsely at the trial of these defendants, that his false testimony was material and highly prejudicial to them and that without this prejudicial and false testimony the jury might have reached a different result.

Wherefore it is respectfully submitted defendants' motion for a new trial should be granted.

(Sgd.) Homer Cummings,
*Attorney for William R. Johnson,
Jack Sommers, James A. Hartigan,
William P. Kelly and Stuart
Solomon Brown, Defendants.*

(Sgd.) William J. Dempsey,
*Attorney for William R. Johnson,
Defendant.*

(Sgd.) Harold R. Schradzke,
*Attorney for Jack Sommers, James
A. Hartigan, William P. Kelly and
Stuart Solomon Brown, Defendants.*

EXHIBIT F.

AFFIDAVIT.

State of Illinois }
County of Cook } ss:

I, William R. Johnson, being first duly sworn upon my oath, depose and say that I reaffirm the testimony given by me in the trial of the case of *United States v. William R. Johnson, et al*, No. 32168, in the United States District Court for the Northern District of Illinois, and in particular I categorically deny the following statements contained in the testimony of William Goldstein (R. 517-518).

I deny that I requested William Goldstein to negotiate for the purchase of the property known as the Albany Park Bank Building, located at 3422-24 Lawrence Avenue, Chicago, Illinois. I also deny that I gave to William Goldstein the sum of \$5,000.00 to make a deposit for the purchase of the aforementioned property; I also deny that I gave to William Goldstein the sum of \$54,887.05 to complete the purchase price of said property; I also deny that I ever gave any sum of money to William Goldstein in the form of currency for the purchase of the aforementioned property. I also deny that Theodore W. Goldstein delivered a quit-claim deed to me at any time for the aforementioned property.

I further deny that Theodore W. Goldstein holds title to the Albany Park Bank Building in trust for me. I further deny that I at any time ever requested William Goldstein or Theodore W. Goldstein to let title remain in the name of Theodore Goldstein because of any intention on my part to organize a bank at any time. I further deny

that during the years 1938 and 1939 I ever inquired of William Goldstein, or any other person or persons, how the income received from the Albany Park Bank Building was taken care of in reference to income tax— or as to whether or not I should report the said income in my income tax returns.

I further deny that William Goldstein at any time stated to me that the Albany Park Safe Deposit Vault Company, Inc., or any other corporation, was getting the benefits of the entire income and making all the expenditures. I further deny that William Goldstein ever stated to me that the Albany Park Safe Deposit Vault Company, a corporation, filed its income tax returns every year up to the time Mr. Frank Sampson took possession of the premises.

I further deny that I ever talked or conversed with William Goldstein at any time regarding the renting of a portion of the premises of the Albany Park Bank Building to Stuart S. Brown, or the amount of rent to be charged Stuart S. Brown, or any other tenants of the building.

I further affirm my testimony and aver that I do not now have and never did have any interest either legal or equitable in the property known as the Albany Park Bank Building, located at 3422-24 Lawrence Avenue, Chicago, Illinois; I further affirm the statement (R. 235) that I have

never at any time discussed with William Goldstein any matters relating to the occupancy, management, rental or income, of the Albany Park Bank Building property, nor have I ever authorized or permitted him to act as my agent for the management of that building.

Affiant further sayeth not.

(Signed) William R. Johnson
William R. Johnson

Subscribed and sworn to before me this 9th day of December, 1944.

(Signed) Martha Medill
Notary Public

96 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 32168) * *

CERTIFICATE OF COURT AS TO VOLUME VIII OF THE BILL OF EXCEPTIONS.

The foregoing Volume VIII of the Bill of Exceptions herein to which this certificate is appended and attached, correctly, accurately and truthfully shows and contains the proceedings had herein that are set forth and referred to in said Volume VIII of said Bill of Exceptions, which said proceedings are as follows:

Petition of Jack Sommers, et al, that they be permitted to take an appeal.

Petition of William R. Johnson that he be permitted to take an appeal.

Order entered March 29, 1944, allowing said appeal by Jack Sommers, et al.

Order entered March 29, 1944, allowing said appeal by William R. Johnson.

Certified copy of order of United States Circuit Court of Appeals entered on November 16, 1944, remanding the cause to the District Court with directions.

Order entered on November 28, 1944, prescribing the time for the filing of the amended motion for a new trial, Government's answer thereto, and reply of defendants, and setting hearing on said motion.

Notice and motion of defendants for production of documents.

97 Order entered November 30, 1944, for production of documents.

Notice and amended motion for a new trial and exhibits attached to and forming part of said motion, filed on December 4, 1944.

Notice and Government's answer to defendants' amended motion for a new trial.

Notice and defendants' reply to Government's answer to defendants' amended motion for a new trial. and the foregoing said Volume VIII of the said Bill of Exceptions is correct and accurate in all respects and is hereby settled, approved, allowed and authenticated as proper in form and as conforming to the truth, and is hereby made a part of the record in this case.

Dated January 19th, 1945.

JOHN P. BARNES,

United States District Judge.

98 On the 15th day of December, 1944, this Court filed a Memorandum Opinion on the defendants' amended motion for a new trial, which said Memorandum Opinion was in words and figures as follows, to-wit:

Filed
Dec. 15,
1944

99 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 32168) * *

MEMORANDUM.

This cause came on to be heard on December 11, 1944, on the amended motion of William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown for a new trial on the ground of newly discovered evidence.

This cause has acquired a long history. The movants and eight others¹ were named as defendants in an indictment.

¹ The indictment was dismissed as to four defendants prior to trial, three defendants were acquitted by the jury at the trial, and one defendant died pending review of a judgment of conviction.

ment returned into this court on March 19, 1940. The indictment contained five counts, four of which charged that William R. Johnson wilfully attempted to defeat and evade income taxes for the years 1936, 1937, 1938 and 1939, respectively, and that the other defendants aided and abetted him in so doing. The fifth count charged conspiracy to defraud the United States of income taxes due from William R. Johnson for said years. The defendants pleaded not guilty. The Government was, on motion of the defendants, directed to file a bill of particulars and one was filed. The trial began, before a judge and jury, on August 27, 1940. The presentation of evidence on the part of the Government began on August 28, 1940. William Goldstein, a witness sworn on behalf of the Government, testified on August 30, 1940. Since the present motion is based on the contention that the movants "have uncovered evidence * * * which demonstrates * * * that William Goldstein * * * testified falsely," it is important to keep Goldstein's testimony in mind. The complete record of the testimony of Goldstein, as it appears in the bill of exceptions,

prepared and filed by and on behalf of the movants and 100 the other convicted defendant appears at pages 55 to 68 of the printed record of the transcript of record filed in the Circuit Court of Appeals for the Seventh Circuit on January 22, 1941, and at pages 516 to 529 of the printed record of the transcript of record filed in said court on January 29, 1944. The Government rested and the defendants began the presentation of evidence on September 26, 1940. On October 10, 1940, the defense rested and the Government presented evidence in rebuttal and again rested. Counsel argued the case to the jury on October 10 and 11, the jury retired at 3:30 P.M. on the 11th and returned a verdict, finding the movants guilty, in the early morning hours of October 12, 1940. Motions for a new trial and in arrest of judgment by the movants were denied and judgments of conviction² were rendered against the movants on October 23, 1940. On September 15, 1941, the Circuit Court of Appeals for the Seventh Circuit reversed (123 F. 2d 111). On February 2, 1942,

² The sentences of the movants are as follows: William R. Johnson, 5 years and \$10,000 fine; Jack Sommers, 4 years and \$8,000 fine; James A. Hartigan, 3 years and \$6,000 fine; William P. Kelly, 4 years and \$8,000 fine; and Stuart Solomon Brown, 2 years and \$4,000 fine.

the petition of the Government for certiorari was granted by the Supreme Court of the United States (315 U. S. 790). The case was argued in the Supreme Court on April 10, 13, 1942. On May 4, 1942, the Supreme Court ordered a reargument, and the case was argued a second time on October 12, 1942. On June 7, 1943, the Supreme Court filed an opinion reversing the Circuit Court of Appeals (319 U. S. 503). Shortly thereafter, the movants filed in the Supreme Court a motion for a stay of mandate, and, as an exhibit thereto, a proposed motion for remand to the Court of Appeals, so that it might, pursuant to Rule 2(3) of the Criminal Appeals Rules,³ remand the case 101 to this court for the purpose of permitting defendants to file a motion for a new trial. The Supreme Court refused to stay the mandate, but ordered that its denial of the motion for a stay of mandate was "without prejudice to the consideration and disposition by the United States Circuit Court of Appeals for the Seventh Circuit of any motion filed under Rule 2(3) of the Criminal Appeals Rules and any motion collateral thereto." The mandate of the Supreme Court was filed with the Circuit Court of Appeals on July 6, 1943. That mandate remanded the case to the Circuit Court of Appeals "for proper disposition in accordance with the opinion" of the Supreme Court. On July 13, 1943, the movants filed in the Circuit Court of Appeals a motion that the case be remanded to this Court to entertain a motion for a new trial. On October 15, 1943, the Court of Appeals ordered the case remanded to this court "to consider and dispose of any motion

³ Rule 2(3) of the Criminal Appeals Rules is as follows:

"Except in capital cases a motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment. *In capital cases the motion may be made at any time before execution of the judgment.*"

The italicized words were added to the rule by amendment on May 31, 1938.

The rule was originally promulgated by the Supreme Court of the United States on May 7, 1934, and became effective September 1, 1934.

filed, or which may be filed, under Rule 2(3) of the Criminal Appeals Rules and any motions collateral thereto," and the order provides that "said District Court is hereby authorized to assume jurisdiction of said causes for such purpose." On October 19, 1943, the movants asked leave of this court to file their motion for a new trial. The court granted leave to file the motion and supporting papers within ten days, and at the same time granted the Government a further period of ten days to file its answering papers, and set the hearing on said motion for November 15, 1943. A hearing was held on said date. On December 28, 1943, the court filed a 68 page memorandum, wherein, among other things, the court said:

"The rule of law that governs the court in its consideration of the present motion has never been better nor more succinctly stated than by Judge Lumpkin, who, speaking for the Supreme Court of Georgia in *Berry v. State*, 10 Ga. 511 (1851), said:

"Upon the following points there seems to be a pretty general concurrency of authority, viz: that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is not cumulative only—viz; speaking to facts, in relation to which there was evidence on the trial. 4th. That it is so material that it would probably produce a different verdict, if the new trial were granted. 5th. That the affidavit of the witness himself should be produced, or his absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.

102 "In 14 Ency. Pl. & Pr., p. 791, it is said concerning the foregoing statement of the rule:

"The above proposition was first formulated in *Berry v. State*, 10 Ga. 511, and has been followed in nearly every state, and in some instances incorporated into the statutes and codes of procedure. (Citing cases from Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, New York,

North Carolina, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Virginia, West Virginia, Wisconsin, and United States)

"In 9 Cyclopaedia of Federal Procedure (2nd Ed.) Sec. 4505, it is said:

'Ordinarily a new trial should not be granted for newly discovered evidence unless it has been discovered since the trial; could not with due diligence have been produced sooner, unless the failure to make it available on the trial resulted from the inexperience and negligence of the attorneys appointed to defend accused; it's not merely cumulative, especially where relating to a collateral matter; is material; is not evidence merely tending to impeach witnesses especially where they testified on a collateral matter; and is likely to produce an acquittal.'

"Cases in the Federal Courts announcing the foregoing rule are the following: *Johnson v. U. S.*, 32 F. 2d 127; *Kithcart v. Met. Ins. Co.*, 119 F. 2d 497; *Weiss v. U. S.*, 122 F. 2d 675, 691; *Evans v. U. S.*, 122 F. 2d 461, 468; *Wagner v. U. S.*, 118 F. 2d 301; *Prisament v. U. S.*, 96 F. 2d 865.

"On the trial, the Government introduced evidence tending to show, among other things, acts of ownership (domination and control) by Johnson of gambling houses, managed by his co-defendants, and the large monetary transactions of such gambling houses, and, also, expenditures by Johnson of sums of money in an amount in excess of his property at a certain date (claimed to be shown by admissions) plus subsequently reported income.

"Since the trial, the parties, from time to time, have referred to two theories of guilt—the 'ownership of gambling house' theory and the 'expenditures' theory. But to separate the evidence touching these two theories and to view the case as presenting only evidence pertinent to one or the other is to assume an artificial view point and one that the jury did not have.

"On the motion now before the court, the defendants concern themselves exclusively with the 'expenditure' theory of guilt. When the court considers this theory, it does so only for the purpose of considering the defendants' arguments and not because it believes

that this viewpoint is the appropriate one from which to consider the case.

"The defendants, by the allegedly newly discovered evidence, attempt to show that the 'expenditure' theory of guilt is not tenable because they say the allegedly newly discovered evidence reduces Johnson's expenditures so that they are \$100,000 less than the sum of his property on a certain date plus subsequently reported income. They contend that the allegedly newly discovered evidence discloses that Johnson owns only one-half instead of all of the Bon Air Country Club, the Curran Farm, the Green House, the White House, the Gas Station, the Dells, and No. 9730 Western Avenue, and that he owns no part of the \$10,000 escrow, the \$7500 escrow or the Albany Park Bank Building.

103 "In order that it may be determined whether the evidence now sought to be presented is 'newly discovered evidence', it is necessary to have in mind in detail (1) the evidence that was presented on the trial, both by the Government and by the defendants, as well as (2) that which might have been presented by the defendants had they fully examined the persons they did not fully examine as witnesses on the trial and now again seek to present, (3) had they placed on the stand as witnesses at the trial the persons they had under subpoena and now seek to present as witnesses for the first time, and (4) had they used diligence in seeking out the persons they now seek to present as witnesses, who were neither presented by them as witnesses at the trial nor under subpoena to appear for them and not presented.

"The ownership of these various properties was a subject of lively interest on the trial.

"On the trial, the Government, in its case in chief, presented evidence showing or tending to show ownership of the afore-mentioned properties. A part of this evidence was that of acts of control over the various properties. When the court outlined this memorandum it intended to insert at this point in narrative form extracts from the testimony of the thirty-nine witnesses who may be said to have testified for the Government concerning ownership or control of one or more of these properties. It was found, however, that to do so would add tremendously to the length of a memorandum already much too long.

Accordingly, the court contents itself with pointing out where in the record the evidence may be found. (References are to be printed Bill of Exceptions filed in the Circuit Court of Appeals).

Evidence of Ownership of the Bon Air Country Club:

Shaw, Tr. 48, 49, 49-51; Goodsell, Tr. 54; Goldstein, Tr. 57-58; Skelly, Tr. 69; Nadherny, Tr. 73, 77, 78, 79, 80, 81, 83, 84, 86, 89; Yoseen, Tr. 89-90; Anderson, Tr. 92; Sommers, Tr. 118; Wendt, Tr. 121, 123, 124, 125; Anderson, Tr. 131; McGinnis, Tr. 135; Goldberg, Tr. 140; Davis, Tr. 142; Kerr, Tr. 143; Fisher, Tr. 144; Paulsen, Tr. 145, 147; Star, Tr. 168; Reedy, Tr. 170, 172, 173; Cervenka, Tr. 228; Kling, Tr. 229; Boras, Tr. 230; DeBettencourt, Tr. 232; Schultz, Tr. 240; Alguire, Tr. 258; Huffman, Tr. 259; Huston, Tr. 260; Leichsenring, Tr. 261; Schafer, Tr. 274; Schmidt, Tr. 336-337; Becker, Tr. 574; O'Neil, Tr. 732; Goodsell, Tr. 775-6.

The Curran Farm:

Goldstein, Tr. 58-59; Skelly, Tr. 69.

The Green House:

Goldstein, Tr. 58; Skelly, Tr. 69.

The White House:

Goldstein, Tr. 58; Skelly, Tr. 69.

The Gas Station:

Goldstein, Tr. 58.

The Dells:

Goldstein, Tr. 59, 67.

104 9730 Western Avenue:

Grushkin, Tr. 41; Goldstein, Tr. 55, 63, 64, 65, 66 (Def. Ex. J-3); Skelly, Tr. 69; Nadherny, Tr. 74, 75, 76, 79, 83, 84, 85, 89; Sommers, Tr. 118; Arndt, Tr. 263; Lynch, Tr. 282; Nechin, Tr. 312, 313, 314; Moore, Tr. 703.

\$10,000 Escrow:

Goldstein, Tr. 60-61; Skelly, Tr. 69.

\$7,500 Escrow:

Goldstein, Tr. 61; Bibow, Tr. 575-6.

Albany Park Bank Building:

Grushkin, Tr. 41, 42; Goldstein, Tr. 56; Koop, Tr. 588; Brandt, Tr. 595, 596.

"On the trial, the defendants presented evidence showing or tending to show ownership of the aforementioned properties. A part of this evidence was that of acts of control over the various properties.

This evidence may be found at the places in the record hereinafter indicated (Again, references are to the printed Bill of Exceptions filed in the Circuit Court of Appeals).

Evidence of Ownership of the Bon Air Country Club:

Johnson, Tr. 955, 963; Spagat, Tr. 893; Wait, Tr. 896, 897, 898, 900, 910, 913; Hare, Tr. 914; Davis, Tr. 916; Goldberg, Tr. 916; Thele, Tr. 919; Rose, Tr. 923; Smith, Henry M., Tr. 923; Boeye, Tr. 925; Meyer, Tr. 928; Allen, Tr. 929; Sullivan, Tr. 992, 993.

The Curran Farm:

Johnson, Tr. 956, 960; Boeye, Tr. 925; Sullivan, Tr. 992, 993.

The Green House:

Johnson, Tr. 956, 963; Tatge, Tr. 922.

The White House:

Johnson, Tr. 956, 963; Sullivan, Tr. 992, 993.

The Gas Station:

Johnson, Tr. 956; 963; Allen, Tr. 929; Sullivan, Tr. 992, 993.

The Dells:

Johnson, Tr. 955, Defs. Ex. J-3; Herman, Tr. 926; Meyer, Tr. 928; Sullivan, Tr. 992, 993.

9730 Western Avenue:

Johnson, Tr. 950, 955, 973; Creighton, Tr. 862, 886, 871, 872; Sullivan, Tr. 992, 993.

\$10,000 Escrow:

Johnson, Tr. 957; Sullivan, Tr. 992, 993.

\$7,500 Escrow:

Johnson, Tr. 957; Sullivan, Tr. 992, 993.

Albany Park Bank Building:

Johnson, Tr. 952, 955, 977; Sullivan, Tr. 992, 993.

"As has been indicated, on the trial the defendants produced sixteen witnesses some parts of whose testimony had bearing upon the ownership of one or more of the ten items of property whose ownership is now questioned."

105 "T. J. Sullivan, a public accountant, testified for the defense at p. 993 Tr. and eliminated from the computations which had been put into the record by the Government's witness Clifford the following items:

Albany Park Bank Building,	\$ 59,887.05
One-half The Dells,	7,942.05
One-half 9730 S. Western Ave.	17,757.50
Two Escrows	17,500.00
Bon. Air,	307,170.23

“By means of the testimony of Sullivan, the defense put before the jury the very contention that they are now seeking to present again in the present motion.

“The defendants now tender, as newly discovered evidence, the testimony of Samuel Hare, Eli Herman, William R. Johnson, Joseph J. Nadherny and Albert Tatge. All of these persons testified on the trial, Hare, Herman and Johnson as witnesses for the defense and Nadherny and Tatge during the presentation of the Government's case in chief, but, on motion of the Government, Nadherny was called as the court's witness. The defendants do not present any excuse for having failed to bring out on the trial what they now seek to elicit from these persons. The aggregate of that now sought to be elicited from these persons is slight and the whole of it, with the exception of one item in Johnson's proposed evidence, is merely cumulative of like evidence produced on the trial. The one item in Johnson's proposed evidence is merely impeaching, and Johnson knew of it for two and one-half years without acting.

“The defendants now tender, as newly discovered evidence, the testimony of John W. Garry, Frederick P. Kirschner, William R. Peacock, John S. Piazza, Walter Piper, Jacob Leo Smith and Joseph J. Sperling, all of whom were under subpoena to appear as witnesses for the defense at the trial but were not called to the stand (It would be more accurate to say that subpoenas *duces tecum* were served on Piazza's company and Piper's company). The defendants do not present any excuse for having failed to present these persons as witnesses at the trial. Counsel for Johnson, in his closing argument to the jury, said:

“We haven't undertaken to conceal that Mr. Geary was in my office last week. We told you he was there. He was there. He was there twice. I can't tell you the conversation I had with Mr. Geary. I have no right to go into an explanation here of why he was not produced, but I say to you, ladies and gentlemen, I accept the responsibility for not producing him. That is my job.” (Page 6518 stenographer's transcript of Trial Proceedings.)

The evidence now sought to be elicited from these persons who were under subpoena is merely cumulative of like evidence produced on the trial.

"The defendants assert that Goldstein testified falsely in respect of ten separate items. These ten items are: the Bon Air Country Club; the Curran Farm; the Green House; the White House; the Gas Station; the Dells; No. 9730 Western Avenue; the \$7,500 escrow; the \$16,000 escrow; and the Albany Park Bank Building.

"The Court will discuss each of the items listed above, and, in doing so, will quote from the printed bill of exceptions the exact testimony of Goldstein with reference thereto. The court will then consider the defendants' allegedly newly discovered evidence."

106 "The defendants do not point out any affidavit wherein it is stated that Johnson did not give Goldstein the money to purchase the Bon Air Country Club, nor is any claim made that such a challenge to Goldstein's testimony is contained in any affidavit.

"The defendants claim only that Goldstein admitted on several occasions that he had committed perjury on the trial. As Authority for this statement, the defendants point to the affidavits of Green (Nos. 5 and 54), Hess (No. 19), defendant Johnson (No. 69), and his brother John E. Johnson (No. 58).

"Maurice Green, affidavit No. 5, states that subsequent to October, 1940, Goldstein discussed with him the trial of Johnson, and that Goldstein told him that his (Goldstein's) testimony regarding purchases of properties for Johnson was false. No date is fixed for this conversation; it might have been any time between October, 1940, and June 24, 1943, which is the date the affidavit was made. It is further observed that Green says that Goldstein's testimony was false 'regarding purchases of properties for the said William R. Johnson,' and this in spite of the fact that Johnson himself corroborates Goldstein's testimony concerning the purchase of Johnson's farm: Johnson has not at any time contended that the purchase of this farm was not handled in the manner in which Goldstein said it was. The purchase of this farm was handled in exactly the same manner as all other transactions which Goldstein testified to in connection with the purchase of property for Johnson. Green is a disbarred lawyer and a person of doubtful credibility.

"In his affidavit, Green further says that about March 15, 1942, Skidmore called him on the telephone

and requested him to come to Skidmore's office, which he did, and that, upon his arrival, he saw Goldstein there; that Skidmore stated he wanted to discuss with Green a partition suit filed in Lake County by John E. Johnson covering the Bon Air Country Club property. Green states that Goldstein said, at that time, that Skidmore could not file an answer, declaring his interest in the properties because, if he did, such an answer would definitely establish Goldstein's testimony on the trial of Johnson as completely false. It seems improbable that Skidmore would call a disbarred lawyer and bakery goods salesman to his office for the purpose of seeking advice in regard to real estate title matters. That he had these conversations with Green is denied by Goldstein in his affidavit (No. 1).

“Green made another affidavit (No. 54) on behalf of the defendants on August 13, 1943. In this affidavit, he describes an alleged meeting with Goldstein in which Goldstein spoke to him concerning Green's previous affidavit. Green says that, at that time, he told Goldstein ‘If Skidmore was a man he'd tell the truth and tell you (Goldstein) to tell the truth,’ to which Goldstein is said to have replied, ‘I can't do that because if I did I would certainly be disbarred and I might as well be dead as disbarred.’ It is difficult to believe that Goldstein, after he learned that the affidavit (No. 5) was made by Green, engaged in a conversation with Green and re-stated that he had lied on the trial of the Johnson case. This meeting is supposed to have occurred on August 11, 1943, and on August 13th Green produced his affidavit No. 54. The matters set forth in Green's affidavit (No. 54) are flatly denied by Goldstein in his affidavit (No. 15). Green discredits himself by the number of opportunities he gives himself to talk to Goldstein and by 107 the improbability of his stories—the improbability that Goldstein would talk to Green after he knew he was unfriendly and the improbability that Skidmore would seek the advice of a disbarred lawyer and bakery goods salesman on a question of real estate law.

“Affidavit No. 19, relied on by the defendants to show that Goldstein committed perjury, was made by Edward J. Hess, attorney of record for Johnson's

co-defendants on the trial. Hess describes what he says was an accidental meeting in his office between Goldstein, Johnson and his brother, John E. Johnson. This affidavit is so vague and the circumstances surrounding the occasion on which the statements of Goldstein are alleged to have been made are such as to make the affidavit worthy of but little consideration. The relationship between Johnson and his co-defendants was so close that the final argument to the jury on behalf of all defendants was made by Johnson's counsel, who also conducted the examination on direct of three of Hess's clients. Johnson, according to Hess, asked Goldstein why he testified that he bought those properties for me when you know you bought them for Skidmore. Why did you lie? to which Goldstein is said to have replied that he was 'sorry that he did.' This could as well be taken to mean that he was sorry he had testified at all, as it could be taken to mean that he was sorry he had testified at all, in the light of the affidavit (No. 5) of Goldstein himself concerning what happened in Hess's office, and the memorandum of an interview with Hess by Special Agent Ralph R. Read (No. 4), cannot be taken to be evidence that Goldstein committed perjury when he testified to the purchase of certain properties for Johnson with money furnished him by Johnson.

"Hess states that this meeting in his office was 'some time subsequent to the filing of the appeal in the United States Circuit Court of Appeals in the case of *United States v. Jack Sommers, et al.*' This is another instance of the failure of the defendants to come within the rule of law requiring defendants to exercise diligence in motions of this type. No where is there any explanation of why, if this is evidence of Goldstein's perjury, it was not called to the attention of the court until after June 16, 1943, the date of the affidavit, and one week subsequent to the decision of the Supreme Court of the United States. This shows not only a lack of diligence but a lack of good faith on the part of defendants in their present action.

"The affidavits of the defendant Johnson and his brother (Nos. 69 and 58) call for little comment. Their interest in the defendants' not having to com-

ply with the judgment of the court is great. A reading of the affidavits of Goldstein, Hess and the two Johnsons, and the statement of Hess to the agent convinces that the meeting was arranged by Hess in order that the two Johnsons might confront Goldstein and persuade him to recant. The court is persuaded that he did not recant. Had he recanted, the defendants would have done something about it then."

"*The Albany Park Bank Building.* Goldstein testified concerning the Albany Park Bank Building as follows (Tr. 56):

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"I did have something to do with the purchase of the property known as the Albany Park Bank Building, at 3424 Lawrence Avenue. I went to the Albany Park Building and interviewed a gentleman by the name of Mr. Larson, who was the chief clerk for Mr. Carter H. Harrison, Junior, who is the receiver for a number of banks closing out. They had an office out at that address. I had a conference with him in connection with the purchase of that building. After making a number of calls and negotiations, I submitted an offer. I was requested by Mr. Johnson to go out there and purchase the building for him. The offer was submitted to the Treasury Department at Washington for approval, and the Treasury Department at Washington approved it and I believe I made a deposit with Mr. Larson of \$5000 at the time. I received the money from Mr. Johnson, in the form of currency. There was a notice, I think, published in the newspaper that the building would be sold to the highest bidder at a certain date, at which time I appeared and bid, I think, around sixty thousand, fifty-nine thousand and some-odd dollars for it. I purchased that property at the request of Mr. Johnson. The exact amount of money expended for the purchase of that property I think was around \$59,800. After looking at the closing statement I can state that the amount expended for the purchase of that property was \$59,887.05. I got that from Mr. Johnson in the form of currency. Title to that property was taken in the name of Ted H. Goldstein, my son. Subsequently there was a quit-claim deed delivered to Mr. William R. Johnson by my son. This Albany Park Building property was purchased July 16, 1937."

Johnson, in this testimony, denies that he gave Goldstein the money to purchase this building or that he had anything to do with the purchasing of it. However, defendants have not, in support of the present motion, presented any affidavit stating that the money was not given to Goldstein by Johnson. In other words, the issue as to this property remains the same as that presented to the jury. None of the affidavits now presented shows that Goldstein, in testifying concerning this property, perjured himself, and Goldstein's alleged perjury is the sole basis for defendants' present motion.

Defendants, in their brief, referred to this property, state: "Goldstein has also given Sampson an option to purchase this building" (No. 51). An unsworn letter, signed by one Leon J. Levine, of the Logan Square Realty and Currency Exchange, and addressed to Victor L. Schlaeger, County Treasurer, contains the following statement:

"The lease does not stipulate any clause with reference to an option, but we are informed that an option to purchase agreement is in force, details of which are not known, as this agreement was not produced for an inspection.

One Louis Blum, in an affidavit made November 12, 1943, says that Sampson told him he, Sampson, has an option. An option to purchase would be an asset of the proposed purchaser. In an affidavit (Government's Ex. 23), Frank Sampson, who is the president of Hines Realty and Construction Company, leaseholder now occupying the building, disclaims any such asset personally and for his company, and says that "No oral or written option now exists or has existed for the company or for me to purchase this property."

Defendants call attention to the affidavit of one Leo Blockus (No. 59), who states that on July 28, 1943, he had a conversation with Goldstein, at which time Sampson, a tenant of the property, and Levine were present. Blockus further states that during this conversation Goldstein stated four or five times: "The property is mine—you will have to remove the receivers from my property." Denial of these statements is made by Goldstein (Ex. No. 15) and Levine (Ex. No. 13) and Frank Sampson (Ex. No. 14).

Counsel for Johnson said, in the opening statement to the jury:

'We will prove that Mr. Johnson had absolutely nothing to do with this currency exchange, had no interest in it whatever, he never cashed a check there, he never exchanged money there, he never bought anything, he never bought a money order there, he never received a dime of income from the place.

'Mr. Johnson owned either the building or an interest in the building. It was an old bank building that went broke when banks went broke in this town. It was put on the market to be sold by the receiver. Mr. Johnson either by himself or as a partner with somebody bought this building as an investment. It was then being operated. The safety deposit boxes were being rented and operated for the convenience of the people in the neighborhood and for others.

'We will prove that there was a woman there in charge of these safety deposit boxes and as Mr. Brown's attorney, Mr. Hess, has said that this building was rented by the currency exchange for fifty dollars a month, I think it was, the money was going to the agent who had charge of the building and it was spent for any expenses to maintain the building and Mr. Johnson got no income at all, but Mr. Johnson did own the building, that it did pay an income and that it did return a net result, so the government says in this indictment.'

'At the time this statement was made, Johnson and the co-defendants were present in the court-room and no correction was made either during the opening statement or at any time during the trial.

'Consideration of the foregoing, impels the court to the conclusion that the situation with regard to the Albany Park Bank Building, from an evidentiary standpoint, is not affected by any allegedly new material now offered by these defendants, and that the issue as to whether or not Johnson gave Goldstein the money to buy the Albany Park Bank Building for him remains as it was before the jury.

'Having considered in detail each separate item of allegedly newly discovered evidence now proposed

by the defendants to be presented to a jury, the court finds and holds that each and every such item is excluded from the classification, "newly discovered evidence warranting a new trial" by at least one of the elements of the rule of law applying in such cases and above stated. All but a few items are merely cumulative of other like items presented at the trial.

110 No adequate reason has been presented for the delay of more than three years in the presenting of these merely cumulative items. The movants have not been diligent as to these items. All items which are not merely cumulative, are merely impeaching. The merely impeaching items are found in the proposed testimony of defendant Johnson, John E. Johnson, a brother of defendant Johnson, Hess, Attorney at the trial for Johnson's co-defendants, Fowler, a discharged employee of Goldstein, and Green, a disbarred lawyer. All of the defendants have known, or are charged with the knowledge of, all impeaching items which they seek to present through the testimony of Johnson, John E. Johnson, and Hess since the spring of 1941—two and one-half years before they were called to the attention of this court. Johnson has known of the matters proposed to be related by Fowler since at least as early as September, 1942, more than one year ago. No adequate reasons have been presented for these delays. The movants have not been diligent as to these items. Green's impeaching evidence is denied by Goldstein (as are all the other items) and, because of its inherent improbability and its source, is not by the court considered worthy of belief. The court does not believe that Goldstein has recanted, does not believe that he perjured himself on the trial and, on the contrary, believes that he was quite circumspect. The facts are that Goldstein on the trial told (with one exception) only what the various escrow papers and records compelled him to tell. That one exception was the source of currency that he deposited in the various escrows. His testimony as to the source of the currency is corroborated by the facts and circumstances in evidence. Johnson is the one person referred to in the evidence who habitually used currency in large amounts (and not bank checks) and habitually kept very large sums of currency on hand. Goldstein's

purchase for Johnson of the Sunny Acres Farms is a corroborating circumstance. Finally, the court finds and holds that the allegedly newly discovered evidence is not such or of such a nature as on a new trial would probably produce an acquittal. The court concludes that the motion for a new trial on the ground of newly discovered evidence should be denied."

On December 31, 1943, the court made an order giving effect to the views expressed in said memorandum filed on December 28, 1943, and denied the motion for new trial.

The defendants appealed, and, on May 6, 1944, the Circuit Court of Appeals for the Seventh Circuit affirmed (142 F. 2d 588).

The next items in the historical narrative are stated by the movants in their amended motion for new trial as follows:

111 "Defendants filed a petition for certiorari in the Supreme of the United States requesting a review of the judgment of the Court of Appeals. While this petition was pending, the Solicitor General of the United States formally advised the Supreme Court that William Goldstein had procured and filed certain income tax returns on behalf of his son, Theodore Goldstein, indicating complete equitable ownership, as well as legal title, in Theodore Goldstein of the Albany Park Bank Building from the date of its purchase by William Goldstein. Defendants' request to the Supreme Court that copies of the Theodore Goldstein returns be filed and made available to them was denied on the ground that such returns were not a part of the record in the cause. Defendants thereupon filed a motion in the Supreme Court requesting that Court to defer action on the petition for certiorari until appropriate motion could be filed in the Circuit Court of Appeals to reopen the record in the case. This motion was granted by the Supreme Court and thereafter defendants filed in the Court of Appeals a motion to reopen the cause and for leave to file with this court an amended motion for new trial. * * *

On November 28, 1944, there was filed in the office of the clerk of this court a certified copy of an order which had been rendered on November 16, 1944, in the Circuit Court of Appeals for the Seventh Circuit, which order was as follows:

"WHEREAS, at the October Term, 1944, of the Supreme Court of the United States, there was pending

in that Court defendants' petition for writs of certiorari to this court, and whereas, On October 10, 1944, the Clerk of the Supreme Court of the United States, by letter, informed defendants' counsel as follows:

'I am authorized by the Court to inform you that your motion for deferment of consideration of the petition for certiorari in the cases of Nos. 153-154, *Johnson et al. v. The United States*, is granted. The Court will withhold consideration of the petition conditioned upon the prompt filing in the Circuit Court of Appeals for the Seventh Circuit of a motion to reopen proceedings on the motion for new trial and until the disposition of that motion by the Circuit Court of Appeals.

'This Court should be kept informed by counsel for the petitioners respecting the presentation to and the action taken thereon by the Circuit Court of Appeals upon the motion which affords the basis for deferment of the consideration of these cases in this Court.

Yours very sincerely,

Charles Elmore Cropley.

WHEREAS, on October 13, 1944, the defendants filed in this Court their motion to reopen the proceedings in this court on their motion for a new trial, and whereas

On October 30, 1944, plaintiff filed its answer to the defendants' motion to reopen that issue, and on October 31, 1944, this court permitted the defendants to file a reply to plaintiff's answer to the defendant's motion, within three days from the date of service of the answer, and that reply was filed on November 4, 1944.

Therefore, this court now reopens the proceedings and vacates its order affirming the order of the District Court denying defendants' motion for a new trial.

The cause is therefore remanded to the District Court, with directions to consider and dispose of the defendants' motion when and if filed in the District Court.

Thereupon the District Court is authorized and instructed to pass upon such amended motion for a new trial, and to certify its ruling to this court at an early date.

112 On November 28, 1944, this court made an order reciting the filing of the certified copy of the order of the Circuit Court of Appeals for the Seventh Circuit, and directing:

"That the defendants file in the office of the clerk of this court, in writing, on or before the 4th day of December, 1944, such motion and supporting papers as the foregoing order of the United States Circuit Court of Appeals for the Seventh Circuit may authorize; that the United States file in the office of the clerk of this court, in writing, on or before the 7th day of December, 1944, such answer as the United States may deem necessary or advisable; and that the defendants file in the office of the clerk of this court, in writing, before 10 o'clock A. M. on the 11th day of December, 1944, such reply as they may deem necessary or advisable; and that the hearing upon such motion as may be filed pursuant to this order be set for 10 o'clock A. M. on the 11th day of December, 1944;

On November 30, 1944, this court, on motion of the movants, ordered that the United States immediately make available to counsel for the movants, for the purpose of inspection and copying, the income tax returns of Theodore Goldstein for the years 1937, 1938, 1939, 1940, and the amended income tax returns of said Goldstein for the years 1941, 1942, and 1943, and that such inspection be permitted to counsel for the movants in the office of the Commissioner of Internal Revenue in Washington, D. C., not later than 12 o'clock, noon, December 2, 1944, and that certified copies of each said returns be filed with the clerk of this court on or before 10 o'clock A. M., December 2, 1944, which certified copies should be open to the inspection and copying of movants' counsel and to the United States Attorney.

On December 4, 1944, the movants filed their "Amended Motion for New Trial," together with the following: Photostat copies of the individual income tax returns of Theodore Goldstein for each of the years 1937, 1938, 1939 and 1940; photostate copies of the amended individual income tax returns of Theodore W. Goldstein for each of the years 1941, 1942 and 1943; photostat copy of a lease dated January 3, 1944, from Theodore Goldstein to Hines Realty & Construction Company; an affidavit of one Frank Sampson, sworn to on October 13, 1944; an affidavit of one
113 Edward H. Wait, sworn to on December 2, 1944; what purports to be a copy of an unsigned "Answer to

Defendants' Motion to Reopen Proceedings on Motion for New Trial," in the Circuit Court of Appeals; and what purports to be a copy of the "Reply to Government's Answer to Defendants' Motion to Reopen Proceedings" in the Circuit Court of Appeals.

On December 7, 1944, the Government filed its answer to the amended motion for new trial, and attached thereto an affidavit of Theodore W. Goldstein, sworn to on December 7, 1944, an affidavit of Stanley A. Wodrick, sworn to on August 12, 1944, an affidavit of Stanley A. Wodrick, sworn to on December 7, 1944, and an affidavit of one Edward H. Schultz, made on December 7, 1944.

On December 11, 1944, the movants filed their reply to the Government's answer to the amended motion for new trial, and attached thereto the affidavit of the defendant William R. Johnson, sworn to on December 9, 1944.

Oral arguments by counsel for the movants and by counsel for the government were heard by the court on December 11, 1944.

The individual income tax returns and amended individual income tax returns of Theodore Goldstein from 1937 to 1943 show the receipt of income from and depreciation on "One story brick 3424 Lawrence Avenue," which is, of course, the Albany Park Bank Building. Considering the mere filing of the income tax returns aforesaid and disregarding the circumstances of their filing, and assuming, without deciding, that a person who holds the bare legal title to a piece of real estate is under no obligation to file an income tax return in respect of the income thereof and that the person who owns the beneficial title is obligated to file such return, it could probably reasonably be argued that the filing by Theodore W. Goldstein of the returns could be held to be some evidence of the fact that during the years in question he had some interest in the property other than as the holder of the bare legal title. But the filing of the income tax returns cannot fairly be considered without at the same time considering the circumstances of their filing.

The affidavit of Theodore W. Goldstein, sworn to on December 7, 1944, and filed by the Government, shows that he is 32 years of age; that he resides with his parents in Chicago and is presently employed by the Ordnance Department of the United States Government; that from the fall of 1931 to the spring of 1938, he was a student at the University of Illinois, Knox College and Loyola Uni-

versity Law School; that during this period he was not gainfully employed, except during the last three years when he secured part time employment while attending law school; that the income derived from part time employment was spent by him in helping to defray his school expenses; that he is title-holder of record to the property at 3424 Lawrence Avenue, Chicago, upon which property is located the building known as the Albany Park Bank Building; that, while he is the title holder of record, he is not the actual owner of this property and does not have and never did have any beneficial or financial interest, or any interest of any kind, in the property; that he did not purchase the property and did not spend any funds for its purchase and did not have anything whatever to do with the purchase of the building; that the property was not purchased for him in any manner by anyone; that he does not now claim and never has claimed any interest in this property or any income or any interest in any income derived from this property, and has not at any time received any interest, rents, profits or any other income whatever from this property; that he has never regarded himself as the actual owner of the property and has never regarded himself as entitled to any rentals or other income from this property; that he filed income tax returns with the Collector of Internal Revenue for the years 1941, 1942 and 1943; that in these returns he did not claim as income any rentals or other income of the property at 3424 Lawrence Avenue, Chicago, for the reason that he did not then and did not any time regard that property as his or regard himself as entitled to any income from it, and for the further reason that he did not, in fact, receive any income from this property; that copies of the income tax returns for the years 1941 and 1942 are attached to affiant's affidavit, and that said copies are true and correct. Affiant further says that in the summer of 1944 he affixed his signature to delinquent income tax returns for the years 1937 to 1940, inclusive, and to amended income tax returns for the years 1941, 1942 and 1943. Affiant further says that he signed those delinquent and amended returns under the following circumstances: That affiant's father, William Golstein, told him that the Internal Revenue Department was insisting that returns be filed by affiant as the title holder of record to the property in question; that he, William Goldstein, had fully explained to the Internal Revenue Department that affiant

was merely the record title holder and had no actual interest in the property, and that the Internal Revenue Department was fully advised of the fact that affiant was merely the record title holder and had no interest in the property or its rents, issues, or profits but that the Internal Revenue Department had nevertheless insisted that, as the record title holder, he was required to file delinquent and amended returns for the property in question and that unless such returns were filed an assessment would immediately be made against affiant; that, upon such information being given him by his father, affiant signed the returns despite the fact that he did not claim any interest in the property or any income derived from the property, and, in fact, was not the actual owner of the building and did not receive any profits or other income whatever from the property.

The affidavit of William Goldstein, sworn to on December 7, 1944, and filed by the Government, shows that, during the first part of April, 1944, Stanley A. Wodrick, a Deputy Collector, called at affiant's office and requested affiant to show him a deed executed to Theodore W. Goldstein on the property located at 3424 Lawrence Avenue, Chicago, known as the Albany Park Bank Building; that affiant

looked through his file and could not find the deed: that 116 affiant and Wodrick went over to the Recorder's office,

checked through the records and found copy of a deed showing title in Theodore Goldstein; that Wodrick stated that his office had requested him to check on this property and income; that affiant stated to Wodrick that Theodore Goldstein was not the owner of the property, that he was merely the holder of the record title; that Wodrick told affiant that in view of the fact that Theodore Goldstein was the title holder of record, his superior had ruled that Theodore must file returns and pay a tax; that affiant told Wodrick that would not be done; that Wodrick thereafter called on affiant at affiant's office on as many as ten different occasions or more and during the visits affiant and Wodrick discussed the situation; that affiant advised Wodrick at all times that Theodore Goldstein and affiant had absolutely no interest in the property. Affiant further says that Wodrick suggested that affiant call at his office to take the matter up further with Mr. Edward H. Schulz, in charge of the office; that affiant made an appointment for a Saturday morning and called at Wodrick's office, where he met Wodrick, who took affiant into Schulz's

office and introduced affiant; that affiant told Schulz that Theodore was merely the record title holder of the property and not the actual owner; that Schulz took the same position as Wodrick and insisted that returns be filed and a tax paid; that, after further discussion, Schulz and Wodrick stated that the Government was interested in collecting a tax and the only one they could collect it from was the owner who appeared of record; that affiant left the office, after advising Wodrick and Schulz that he would not pay any tax on the rental income. Affiant further says that sometime later Wodrick called affiant at his office and they had a further conversation concerning this matter, and affiant concluded that if Theodore Goldstein failed to file returns and pay a tax that an assessment would be made against him for whatever taxes were claimed to be due; that sometime later, affiant again called on Wodrick at his office; that Wodrick advised affiant that he was working on the figures and would prepare the returns for Theodore's signature; that affiant and Wodrick again discussed the tax and ownership, that Wodrick persisted in his position that Theodore Goldstein, the title owner of 117 record must file returns and pay a tax. Affiant further says that he thereafter again called on Wodrick at his office; that Wodrick handed him the income tax returns which were prepared by him for Ted Goldstein's signature; that affiant took them home with him and had Theodore sign them and returned them to Wodrick's office; that Wodrick acknowledged the signature on the returns; that Wodrick then took affiant to the cashier's cage, affiant paid the tax and walked back to his desk with him; that Wodrick called over one Sherwood Hinman, who is the chief deputy in charge of the northwest side branch, who had replaced Mr. Schulz; that, while sitting there, Wodrick presented to affiant a return, all filled in, showing a tax of over \$13,000; that affiant asked him what it was; that Wodrick told him that, in view of the fact that Theodore is the title owner, they must collect a tax on the \$60,000, which was the purchase price of the property in question; that affiant told Wodrick that he would not pay that under any circumstances, that Theodore had had no money, and, particularly, as great an amount as \$60,000; that Hinman then spoke up and said, "What seems to be the trouble: is the assessment too much money?"; that affiant said "if the amount was only thirteen cents I wouldn't pay it;" that Wodrick retained the return and affiant left his

office. Affiant further says that during the course of one of his conferences with Wodrick, Wodrick presented to affiant at his office a memorandum which read in part as follows: "I have acted as attorney and agent for my son, Theodore, the owner, in the management of the property located at 3424 Lawrence Avenue, Chicago, Illinois, purchased for my son, Theodore, in 1937"; that after looking this statement over, affiant told Wodrick that it was not correct, not true, and affiant refused to sign it; that a copy of said memorandum is attached to this affidavit; that at some later date, when affiant was in Schulz's office at 3256 North Pulaski Road, a new typewritten memorandum was prepared stating that Theodore was the title owner of record, which was signed by affiant; that a copy of this memorandum is also attached to this affidavit. Affiant further says that, at the same time, he reaffirms the testimony given by him in the trial of the case of *United States v.*

William R. Johnson, et al., concerning the Albany Park 118 Bank Building, and, in particular, restates that the amount expended for the purchase of the Albany Park Bank Building property was \$59,887.05, and that affiant got that money from Mr. Johnson in the form of currency; that affiant does not have and never did have any right, title or interest of any kind in the property at 3424 Lawrence Avenue, Chicago, or in its rents, profits, income or issues, and does not now and never has claimed any such right, title or interest.

The affidavit of Stanley A. Wodrick, sworn to on August 12, 1944, and filed by the Government, shows that Wodrick was a Zone Deputy Collector with the Collector of Internal Revenue, United States Court House, Chicago; that his division chief handed him a communication dated April 17, 1944, signed by Daniel J. Conerty, Chief Field Deputy, which said that an anonymous telephone communication had been received stating that the income from the building at 3424 Lawrence Avenue had not been reported by anybody and supposedly the rents were paid by different tenants occupying the property to a William Goldstein, who claims that he is agent for Theodore Goldstein, which communication was assigned to affiant for investigation; that after the receipt of this communication, affiant called first at the Albany Park Bank Building and then at the office of William Goldstein and talked with William Goldstein; that affiant asked Goldstein who the owner of the building at 3424 Lawrence Avenue was; that

Goldstein replied "I do not know the owner;" that Goldstein then asked affiant the reasons for the investigation; that affiant explained to Goldstein that rent received from the Albany Park Bank Building had not been reported by anyone and it was discovered that he, William Goldstein, was acting agent for Theodore Goldstein; that William Goldstein objected to that, saying that Theodore Goldstein was not the owner of the building, but merely title owner of record; that to confirm that statement, William Goldstein and affiant went to the County Building and checked the title; that there they found a record showing Theodore Goldstein as owner; that affiant explained to William Goldstein that since the title shows Theodore Goldstein as the owner, he was the person who was to report rents received from the Albany Park Bank Building, 3424

Lawrence Avenue in his income tax returns for the years 1937 through 1943; that William Goldstein objected to that, stating that Theodore Goldstein was not the actual owner; that, after a few days, William Goldstein agreed to have the returns prepared for Theodore Goldstein, showing the rent income from the Albany Park Bank Building for the years 1937 through 1943; that Goldstein said the reason he was agreeing or wanted to agree and prepare these returns for his son was that he would like to have the matter closed as soon as possible; that affiant prepared income tax returns for the years 1937, 1938 and 1939, showing no tax due; that affiant also requested copies of transcripts of income tax returns for 1940 through 1943; and these are in process of completion for Theodore Goldstein; that when affiant first contacted William Goldstein he declared he did not know who owned the property; he was rather surprised to hear a question as to who was the owner of the building; he said it was all a part of court record, and he also stated that he received money from persons unknown for the purchase of that building; he also stated that he did not know whether it was Skidmore's or Johnson's money; that affiant also asked William Goldstein the purpose of placing the title in Theodore Goldstein's name, and he replied that at one time William Johnson had an idea of opening a bank, to be located in the building at 3424 Lawrence Avenue, known as the Albany Park Bank Building, and he did not want to disclose the identity of the owners of the building to the people in the neighborhood; that affiant asked Goldstein whether the rent money was held in an account for the

purpose of returning that money to the person or persons to be later identified as the owners of the building, and Goldstein replied that he merely kept the money but did not have a special account for that purpose; that affiant's reason for asking that question was to ascertain the person liable for income tax based on rental income received from the tenants of the building; that affiant told William Goldstein that the income received from the building should be reported on the income tax returns of Theodore Goldstein since he was the owner of record; that William Goldstein stated that Theodore Goldstein was not the owner and that he was the title owner of record and, as such, could not be held liable for the tax; that affiant then explained to William Goldstein that since the title shows the name of Theodore Goldstein, he was the individual or person who should report the income received from the building; that the first time William Goldstein was approached on the subject he disagreed, stating that Theodore Goldstein was not the actual owner; that after a few days, affiant called on William Goldstein and at that time he agreed to have the returns prepared in the name of Theodore Goldstein; that affiant told William Goldstein that he proposed to report approximately \$60,000 income on Theodore Goldstein's 1937 income tax return as being income received in that year on the purchase of the Albany Park Bank Building; that William Goldstein disagreed very strenuously to the extent that he stated that he did not think any court in the country would uphold the assessment, he stated that, since the money had never been received by Theodore Goldstein, he did not see how we could proceed on the basis that \$60,000 was income to Theodore for the year 1937. Affiant further says that he has seen the unsigned and undated typewritten memorandum which reads, in part: "I have acted as attorney and agent for my son, Theodore, the owner, in the management of the property located at 3424 Lawrence Avenue, Chicago, Illinois, purchased for my son Theodore, in 1937;" that said statement was in my possession at one time; that said statement was given to me by Edward H. Schultz, Division Chief of the Northwest Division Office; that affiant did not receive said statement with the original assignment; that the approximate date that affiant received the statement was about a week prior to June 13, 1944; that Schultz said to affiant at the time he handed

the memorandum to affiant that he wanted William Goldstein to sign the statement; that affiant does not recall that Schultz gave any reason for having the statement signed by William Goldstein; that affiant took the undated memorandum to William Goldstein and asked him to sign it; that William Goldstein gave reasons why he could not sign the memorandum; that William Goldstein stated that he could not sign a statement like that; that William Goldstein objected to the words contained in the memorandum, namely, "the owner" and "purchased for my son, Theodore, in 1937;" that those words appear in the 121 first paragraph of the memorandum; that it was then suggested to William Goldstein that he word his own statement, one that he thought would be suitable, and properly sign it; that Edward H. Schultz, the Division Chief, made that suggestion to William Goldstein at a conference in Schultz's office, no other persons being present; that the letter, addressed to the Honorable Carter H. Harrison, Collector, U. S. Court House, Chicago, dated June 13, 1944, signed by William Goldstein and which reads in part: "Reference is made to rental income from property located at 3424 Lawrence Avenue, Chicago, Illinois, which has not been reported in income tax returns by my son, Theodore Goldstein, title owner of record, and which was received by me as agent." is the statement dictated and signed by William Goldstein.

An affidavit of Stanley A. Wodrick, sworn to on December 7, 1944, and filed by the Government, states that he has examined the statement made by him on August 12, 1944, and wishes to make a correction in a portion of it; that is, in response to the question:

"What else did William Goldstein say at that particular time in regard to the collection of rents or the ownership of that property?"

to which he answered:

"He was rather surprised to hear a question as that as to who was the owner of the building. He said it was all a part of court record and the testimony previously given, and he also stated that he received money from persons unknown for the purchase of that building."

that what affiant meant and intended to say at that time was that Goldstein stated to affiant that he did not know whose money it was that he had received for the purchase

of that building; that at no time did affiant ask Goldstein who gave him the money for the purchase of that building and at no time did he say that unknown persons gave him the money to purchase that building.

122 The affidavit of Edward H. Schulz, sworn to on December 7, 1944, and filed by the Government, shows that he is Division Chief in Charge of the Miscellaneous Tax Squad of the Field Division of the Treasury Department, Internal Revenue Bureau, Chicago; that, in the latter part of April, 1944, while he was Division Chief in Charge of the Northwest Division Office of the Field Division, located at 3256 North Pulaski Road, Chicago, he received an assignment from the Chief Field Deputy to institute an investigation for the purpose of determining the identity of the persons interested in or receiving income from a building located at 3424 Lawrence Avenue, Chicago, that pursuant to this assignment, he instructed Stanley A. Wodrick, a deputy collector, attached to his office, to conduct such investigation; that thereafter and during the course of such investigation, affiant had conversations on three or four occasions with William Goldstein relative to the interest, if any, of Theodore Goldstein in the property at 3424 Lawrence Avenue, Chicago; that in these conversations William Goldstein at all times stated that Theodore Goldstein was the title owner of record of the property only and was not the actual owner of it; that Goldstein was very definite in making this fact understood; that, as Division Chief affiant told William Goldstein that Theodore Goldstein, as title owner of record, was required to file income tax returns on this property even though the claim was made that Theodore Goldstein was not the actual owner of the property. Affiant further states that after William Goldstein had informed him that Theodore Goldstein was title owner of record only, he received a communication in the form of typewritten suggestions from the office of the Chief Field Deputy, a copy of which is attached to the affidavit; that affiant requested William Goldstein to sign an affidavit embracing the suggestions contained in the typewritten suggestions forwarded to affiant; that Goldstein read the typewritten suggestions, and stated that he would not sign any affidavit containing any statement that his son Theodore was "the owner" of the property located at 3424 Lawrence Avenue, Chicago, or containing any statement that he purchased that property for his son Theodore, and, at the same time he reiterated his

statement that his son Theodore was not the owner of that property but was merely the title owner of record.

123 The affidavit of William R. Johnson, sworn to on December 9, 1944, and filed by the movants, states that he reaffirms the testimony given by him on the trial, and particularly denies that he requested William Goldstein to negotiate for the purchase of the Albany Park Bank Building, that he gave William Goldstein \$5000 to make a deposit for the purchase of said property, that he gave William Goldstein \$54,887.05 to complete the purchase price of said property, or that he ever gave any money to William Goldstein in the form of currency for the purchase of said property, or that Theodore W. Goldstein delivered a quit-claim deed to him at any time for said property; that he further denies that Theodore W. Goldstein holds title to the Albany Park Bank Building in trust for affiant, that he at any time requested William Goldstein or Theodore Goldstein to let title remain in the name of Theodore Goldstein because of any intention on his part to organize a bank; or that during the years 1938 and 1939 he ever inquired of William Goldstein or any other person how the income received from the Albany Park Bank Building was taken care of in reference to income tax or as to whether or not affiant should report said income in his income tax returns; that affiant further denies that William Goldstein at any time stated to him that the Albany Park Safe Deposit Vault Company, a corporation, filed its income tax returns every year up to the time Frank Sampson took possession of the premises; that affiant further denies that he ever talked with William Goldstein regarding the renting of a portion of the premises of the Albany Park Bank Building to Stuart S. Brown, or the amount of rent to be charged Brown or any other tenants of the building; that affiant affirms his testimony and avers that he does not now have and never did have any interest either legal or equitable in the Albany Park Bank Building, that he affirms the statement that he never at any time discussed with William Goldstein any matters relating to the occupancy, management, rental or income of the Albany Park Bank Building property, or that he ever authorized or permitted him to act as his agent for the management of that building.

124 The movants have filed with their motion a photostatic copy of a lease dated January 3, 1944, between Theodore Goldstein and the Hines Realty & Construction Co.,

demising the Albany Park Bank Building for a period of ten years from October 1, 1946.

The movants also filed an affidavit by Frank Sampson, sworn to on October 13, 1944, wherein affiant states that he has known William Goldstein for approximately 38 years; that on September 15, 1941, he discussed with William Goldstein the leasing of the Albany Park Bank Building; that after several discussions with William Goldstein, affiant entered into a lease on September 29, 1941, the parties being Theodore Goldstein by William Goldstein, Agent, as lessor, and Hines Realty & Construction Company by F. Sampson, President, as Lessee; that said lease was for the period beginning on September 29, 1941, and expiring on September 30, 1946, at a monthly rental of \$250 to and including September 30, 1943, and \$300 per month for the remaining period; that affiant has paid the rental to said William Goldstein as agent for Theodore Goldstein each and every month in accordance with the terms of said lease to and including September, 1944; that it has been a general custom of William Goldstein to come to the Albany Park Bank Building each month for the collection of the monthly rental; that on some occasions, however, Goldstein requested affiant by telephone to mail him the rental check; that William Goldstein has never at any time stated to affiant that William R. Johnson had any right, title or interest in the building; that during the month of November, 1943, affiant stated to William Goldstein that affiant was interested in the organization of a bank to be operated in the building and that affiant was desirous of obtaining from him a lease for a longer period of time than the lease which was in existence; that affiant explained to William Goldstein that it would be necessary to have an option to renew the present lease for an additional period of ten years before he could attempt to organize a bank; that Goldstein said it was not necessary for affiant to have an option of renewal, as affiant could stay in possession of the premises as long as affiant wished; that affiant explained to Goldstein that it would necessary for affiant to have the option of renewal in writing; that 125 Goldstein replied by stating that he could not give affiant an option for extension at that time, that affiant would have to wait until the court ruled in the Johnson case which was then pending before Judge Barnes; that affiant then asked Goldstein if Johnson had anything to do with

the property, and Goldstein replied, "Johnson never had any interest in the property and has nothing whatever to do with it;" that affiant discussed the question of an option for an extended period of time with Goldstein on five or six occasions between November, 1943, and January 1, 1944; that during the latter part of December, 1943, in discussing the matter of an option for an extended period of time, William Goldstein suggested that affiant prepare a lease in conformity with affiant's ideas on the matter; that affiant prepared said lease and submitted it to Goldstein; that at that time affiant explained to William Goldstein that it would also be necessary for affiant to have the lease signed by his son Theodore Goldstein, who was owner of the property rather than William Goldstein, as agent as was done with the five-year lease; that William Goldstein told affiant that his son Theodore was in the Armed Forces of the United States and that it would be necessary for him to bring the lease to his son Theodore for the purpose of having Theodore place his signature on the lease; that Goldstein said he and his wife were going to Hot Springs, Arkansas, and that his son was stationed close by and while visiting there he would visit with his son and obtain his signature to the lease; that on January 3, 1944, William Goldstein presented to affiant a lease in which the Hines Realty and Construction Company is lessee, of which corporation he is president, and Theodore Goldstein as lessor, for the Albany Park Bank Building for a term of ten years beginning on October 1, 1946, and ending September 30, 1956, at a monthly rental of \$300; that said lease provides that the lessee agrees to deposit with the lessor the sum of \$6000 to be held as security for the payment of the rent for the last 20 months under the terms thereof, provided the said money shall be used by Theodore Goldstein to pay said sum of money upon the delinquent general real estate taxes past due upon the property; that said lease further provides that lessee shall have the right to assign said lease upon the formation of a bank prior to July 15, 1944; affiant further says that on or about July 10, 1944, he had a further discussion with William Goldstein; that affiant, realizing that he would be unable to open a bank on or before July 15, 1944, requested William Goldstein, as agent for Theodore, to extend the time limitation from July 15, 1944, to September 15, 1944; that on July 13,

1944, William Goldstein as agent for Theodore Goldstein, addressed a letter to affiant wherein William Goldstein, as the agent for Theodore Goldstein, extended the time limitation to affiant for the opening of the bank to September 15, 1944.

William Goldstein, in his affidavit above referred to, made on December 7, 1944, and filed by the Government, said that he has read the affidavit of Frank Sampson dated October 13, 1944; that in affiant's discussion with Sampson relating to an option to renew the lease then in existence he did not state to Sampson that it was unnecessary for him to have an option of renewal as he could stay in possession of the premises as long as he wished, that at no time did affiant make any such statement to Sampson; that neither at that time nor at any other time did affiant say to Sampson in connection with an option for extension of the lease that Sampson would have to wait "until the court ruled in the Johnson case which was then pending before Judge Barnes;" that at no time did affiant state to Sampson that "Johnson never had any interest in the property and has nothing whatever to do with it."

The movants also file an affidavit of Edward H. Wait, sworn to on December 2, 1944, wherein he states that on or about April 16, 1941, he caused an order for envelopes and letter-heads for the Bon Air Country Club to be placed with the Waukegan Post, Inc., located in Waukegan, Illinois; that on or about July 8, 1941, the Waukegan Post, Inc., addressed an invoice to the Bon Air Country Club which invoice stated the merchandise ordered, the price of the merchandise and the date that the merchandise was ordered, namely, April 16, 1941; that payment of said invoice was not made to the Waukegan Post, Inc., because of a controversy concerning the price and failure to deliver the merchandise ordered; that a proceeding 127 in debt was instituted in October, 1941, before Harry

Hoyt, Justice of the Peace of Lake County, Illinois, wherein the Waukegan Post, Inc., was plaintiff and the Bon Air Catering, Inc., was defendant; that summons was issued October 7, 1941, and was returnable October 14, 1941; that judgment was rendered in favor of the plaintiff in the sum of \$57.60; that subsequently this judgment was satisfied upon delivery of the merchandise; that invoice above referred to was the only invoice rendered to the Bon Air Country Club or the Bon Air Catering, Inc., by the Waukegan Post,

Inc., that resulted in litigation or judgment in any court, to the best of affiant's knowledge; that affiant was associated with the management of and has had charge of and full knowledge of the ordering and receipt of merchandise for the Bon Air Country Club and the Bon Air Catering, Inc., from the inception of business operations in May, 1938, to January, 1942; that attached is a photostatic copy of the invoice referred to, which is marked Exhibit D; that the pencil notations appearing on the invoice were made subsequent to receiving it.

The foregoing are all of the supposedly evidentiary papers which have been filed by either movants or the Government on the amended motion for new trial, with the exception of two papers filed by the movants, one being "Answer to Defendants' Motion to Reopen Proceedings on Motion for New Trial," and the "Reply to Government's Answer to Defendants' Motion to Reopen Proceedings," both filed in the Circuit Court of Appeals. The court assumes that these papers were filed to advise this court of the proceedings in the Circuit Court of Appeals. They do not seem to have any other bearing on the questions now before this court.

128 The court has observed that the filing of the income tax returns above referred to by Theodore Goldstein cannot fairly be considered without at the same time considering the circumstances of their filing, which circumstances have been detailed in the affidavits above referred to of Theodore Goldstein, William Goldstein, Stanley A. Wodrick and Edward H. Schulz. Those circumstances clearly negate any possibility of its being reasonably contended that the filing of the returns by Theodore Goldstein can be held to be any evidence that during the years in question he had some interest in the premises other than as the holder of the bare legal title. The affidavits of William Goldstein, Wodrick and Schulz do disclose an extraordinary and remarkable effort upon the part of Daniel J. Conerty, Chief Field Deputy, through Edward H. Schulz, Division Chief in Charge of the Northwestern Division Office of the Field Division of the Treasury Department, Internal Revenue Bureau, and Stanley A. Wodrick, deputy collector of Internal Revenue, to induce and procure William Goldstein to sign a statement, prepared in the office of the Chief Field Deputy, containing the following sentence: "I have acted as attorney and

agent for my son Theodore, the owner, in the management of the property located at 3424 Lawrence Avenue, Chicago, Illinois, purchased for my son Theodore in 1937." The affidavits not only of William Goldstein but also those of Schulz and Wodrick show that Mr. Connerty did not succeed in this effort, and that Goldstein at all times refused to sign the statement requested. But, considered in the light most favorable to the movant and disregarding the circumstances of their filing, the income tax returns are excluded from the classification "newly discovered evidence warranting a new trial" by at least two of the elements of the rule of law applied in such cases, and above stated. It cannot be said of these income tax returns that they are so material they would probably produce a different verdict if a new trial were granted.

Neither can it be said that they are not cumulative only. 129 They clearly speak of facts in relation to which there was evidence on the trial. As a matter of fact, there was not only evidence on the trial as to the ownership of the Albany Park Bank Building in William R. Johnson, but there was an express admission by counsel for William R. Johnson in his opening statement of ownership by Johnson of this building. Counsel in his opening statement said:

"Mr. Johnson owned either the buildings or an interest in the buildings. It was an old bank building that went broke when banks went broke in this town. It was put on the market to be sold by the receiver. Mr. Johnson either by himself or as a partner with somebody bought this building as an investment. * * Mr. Johnson got no income at all, but Mr. Johnson did own the building. * *"

In the light of that admission made on the trial, it approaches the absurd and fantastic that courts should now, more than four years later, be considering motions for a new trial on the ground of newly discovered evidence as to the ownership of the building whose ownership was admitted.

The lease, dated January 3, 1944, from Theodore Goldstein to the Hines Realty & Construction Company, presented on this amended motion for new trial, is of no greater evidentiary value than the lease which was presented on the motion for new trial filed in 1943. Of that, this court said:

"The movants also present a lease bearing date the next day July 7, 1937, from Ted. W. Goldstein to Albany Park Safe Deposit Vault Company and demising the vaults and safe deposit boxes for the period of one year. This is not inconsistent with Goldstein's testimony on the trial."

The same may be and is said of the lease now presented. The movants also present the affidavit of Edward H. Wait. Wait was one of the original defendants, who was tried with the movants and acquitted. He testified that he was 72 years of age at the time of trial, that in 1893 he came to Chicago and became a professional poker player and since that time, with some interruptions, he had operated gambling houses in and around Chicago. His affidavit is by the movants contended to corroborate Fowler and contradict Attorney Max Lidschin, whose affidavits were presented on the motion for new trial made in 1943. The court does not think it has that effect.

130 Having considered in detail each separate item of allegedly newly discovered evidence, including not only that now proposed by the movants to be presented to a jury, but also that by their motion filed in 1943 proposed by the movants to be presented to a jury, the court finds and holds that each and every such item is excluded from the classification "newly discovered evidence warranting a new trial" by at least one of the elements of the rule of law applying in such cases and above stated. All but a few items are merely cumulative of other like items presented at the trial. No adequate reason has been presented for the delay of more than four years in the presenting of these merely cumulative items: All items which are not merely cumulative, are merely impeaching. The merely impeaching items are found in the proposed testimony of defendant Johnson, John E. Johnson, a brother of defendant Johnson, Hess, attorney at the trial for Johnson's co-defendants, Fowler, a discharged employee of Goldstein, Green, a disbarred lawyer, and Sampson, who makes an affidavit filed December 4, 1944. All of the defendants have known, or are charged with knowledge of, all impeaching items which they seek to present through the testimony of Johnson, John E. Johnson, and Hess since the spring of 1941, two and one-half years before they were called to the attention of this court. Johnson has known of the matters proposed to be related

by Fowler since at least as early as September, 1942, more than one year before it was presented. No adequate reasons have been presented for these delays. The movants have not been diligent as to these items. Green's impeaching evidence is denied by Goldstein (as are all the other items) and, because of its inherent improbability and its source, is not by the court considered worthy of belief. Sampson's alleged impeaching evidence is not in fact impeaching and furthermore is denied by Goldstein. The court does not believe that Goldstein recanted, does not believe that he perjured himself on the trial and, on the contrary, believes that he was quite circumspect. The facts are that Goldstein on the trial told (with one exception) only what the various escrow papers and 131 records compelled him to tell. That one exception was the source of the currency that he deposited in the various escrows. His testimony as to the source of the currency is corroborated by the facts and circumstances in evidence. Johnson is the one person referred to in the evidence who habitually used currency in large amounts (and not bank checks) and habitually kept very large sums of currency on hand. Goldstein's purchase for Johnson of Sunny Acres Farms is a corroborating circumstance. Finally, the court finds and holds that the allegedly newly discovered evidence is not such or of such nature as on a new trial would probably produce an acquittal. The court concludes that the amended motion for a new trial on the ground of newly discovered evidence should be denied.

The court's consideration of the present amended motion has included a consideration of the files and records of this court in this case and all proceedings had and evidence received on the trial of this case. The court's recollection of what transpired on the trial has been refreshed by an examination of: (a) The Government's and defendants' transcripts of the proceedings on the trial, including opening statements and arguments to the jury; (b) the bill of exceptions prepared and filed by the defendants of certain of the proceedings on the trial; and (c) the printed transcript prepared by the clerk of the Circuit Court of Appeals and used on the appeals to that court in this case on the motion of one year ago. The court directed both the Government and the defendants to produce their respective transcripts of the proceedings on the trial for the use of the court and so that it might refresh its recollection of what transpired at the trial. Both sides

complied with this order but the defendants objected to the court's use of the transcripts because they said there are errors in the transcripts. The court directed counsel for the defendants to point out any errors in the transcripts within five days. None was pointed out within that time or at any time, but the court did receive a letter from counsel for defendants, a copy of which is attached to the court's memorandum filed December 28, 1943 and marked Exhibit 2.

132 The court's consideration of the present motion has also included, of course, a consideration of all affidavits and papers and briefs filed by movants, as well as those filed by the Government, and all oral arguments made by counsel for each side.

The court desires that not only this memorandum but also the memorandum filed December 28, 1943, be considered in connection with the order denying the amended motion for a new trial.

The court is signing an order denying the amended motion for a new trial.

(Sgd.) John P. Barnes,
Judge.

December 15, 1944.

133 On the 15th day of December, 1944, the cause came on to be heard on the defendants' amended motion for a new trial, and the following proceedings were had:

(Caption—Barnes, J.)

134

Friday, December 15, 1944.
2 o'clock p.m.

Present:

Mr. Hurley and Mr. Finn, for the Plaintiff.
Mr. Dempsey and Mr. Schradzke, for the Defendants.

The Court: I am filing a memorandum and an order, gentlemen. Counsel may note exceptions at the foot of the order, if they like, and there is a copy of the papers for the parties on each side.

Is there any thing else?

The Clerk: No.

Mr. Schradzke: Will your Honor be in any further this afternoon?

The Court: I won't be here very long.

Mr. Dempsey: If your Honor please, in the event your Honor's order denies the motion, may we be allowed an appeal on behalf of all the defendants?

The Court: Yes.

Mr. Dempsey: Thank you, your Honor.

The Court: You want that to show now?

Mr. Schradzke: Yes, sir.

Mr. Dempsey: Yes, sir.

(Which were all of the proceedings had at said time and place.)

136 State of Illinois }
County of Cook } ss.

Frederick Julian, being first duly sworn, on oath deposes and says that he is and has been for many years last past a shorthand reporter practicing his profession in the City of Chicago, Illinois; that he reported the above and foregoing proceedings before Judge John P. Barnes on the 15th day of December, A. D. 1944, in the case of United States of America versus Johnson, et al., and that the same is a true and correct transcript of what transpired at said time and place.

(Signed) Frederick Julian.

Subscribed and sworn to before me this 4th day of January, A. D. 1945.

(Seal)

(Signed) E. L. Drummond,
Notary Public.

138 Thereupon, over the objection of all of the defendants, this Court on the 15th day of December, 1944, entered an order denying the defendants' said amended motion for a new trial, to the entry of which said order the defendants then and there duly excepted, and which said order was in words and figures as follows, to-wit:

139 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 32,168) * *

Entered
Dec. 15,
1944

ORDER.

This cause having come on to be heard on December 11, 1944, on the amended motion of the above named defendants for a new trial on the ground of newly discovered evidence;

And the court, in passing on defendants' amended motion, having taken into consideration the written motions of defendants filed October 29, 1943, the amended motion filed December 4, 1944, all affidavits and all other material filed by defendants in support of said motions, the answers of the Government with the affidavits and other material filed by the Government in support of its answers, the briefs of the parties on both sides, and having heard and considered arguments of counsel for the parties, and having considered also all of the files and records of this court in this cause and all proceedings had and evidence received on the trial of said cause;

And the court's recollection of what transpired on the trial having been refreshed by an examination of (1) the Government's and defendants' transcripts of the proceedings on the trial, including opening statements and arguments to the jury; (2) the bill of exceptions prepared and filed by the defendants of certain of the proceedings on the trial, and (3) the printed transcript prepared by the clerk of the Circuit Court of Appeals and used on the appeals to that court in this cause;

And whereas the Court, having so considered in de-
140 tail each item of allegedly newly discovered evidence presented by the defendants in support of their motions for a new trial, finds and concludes:

1. That none of these items of allegedly newly discovered evidence constitutes "newly discovered evidence warranting a new trial;"

2. That all but a few items are merely cumulative of other like items presented at the trial, and no adequate reason has been presented for the delay in the presenting

of these merely cumulative items; and that the defendants have not been diligent as to these items;

3. That all items which are not merely cumulative are merely impeaching, the impeaching items being found in the proposed testimony of the defendant Johnson, John E. Johnson, a brother of defendant Johnson, Hess, attorney at the trial for Johnson's co-defendants, Fowler, a discharge employee of Goldstein, and Green, a disbarred lawyer; that insofar as the proposed testimony of all these individuals mentioned, except Green, is concerned, the defendants have not been diligent and have presented no adequate reason for their lack of diligence; and that the proposed testimony of Green is inherently improbably and because of this and because of its source is not worthy of belief; the allegedly impeaching testimony of Sampson is not in fact impeaching when the terms of Goldstein's testimony on the trial are considered;

4. That Goldstein has not recanted, and did not perjure himself on the trial; that Goldstein's testimony concerning the source of currency utilized in the purchases and proposed purchases of properties mentioned by him is corroborated by facts and circumstances in evidence at the trial;

5. That the allegedly newly discovered evidence is not such or of such a nature as on a new trial would probably produce an acquittal;

141 6. That the amended motion for a new trial on the ground of newly discovered evidence should be denied;

All in accordance with and more fully set forth in the opinion of this Court entitled "Memorandum" filed with the clerk of this court as a part of the records and files in this cause on December 28, 1943, and the opinion of this court entitled "Memorandum" filed with the clerk of this court as a part of the records and files of this cause on December 15, 1944.

Wherefore, It Is Ordered that the defendants' amended motion for a new trial be and it is hereby overruled and denied; and

Whereas the order of the Circuit Court of Appeals for the Seventh Circuit rendered November 16, 1944, a certified copy whereof was filed in the office of the clerk of this court on November 28, 1944, provides:

"Thereupon the District Court is authorized and instructed to pass upon such amended motion for a new trial, and to certify its ruling to this court at an early date."

It Is Ordered that the clerk of this court forthwith file a certified copy of this and the foregoing order in the office of the clerk of the Circuit Court of Appeals for the Seventh Circuit.

Enter:

(Sgd.) John P. Barnes,
Judge.

Dated at Chicago, Illinois, this 15th day of December, 1944.

All Defendants duly except.

142. Thereupon on the 19th day of December, 1944, the defendant, Stuart Solomon Brown, filed a notice of a motion to modify the order entered December 15, 1944, denying the defendants' amended motion for a new trial, which said notice was in words and figures as follows, to-wit:

Filed
Dec. 19
1944

143 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 32,168) * *

NOTICE.

To:

Hon. J. Albert Woll,
United States Attorney,
450 U. S. Courthouse,
Chicago, Illinois.

You Are Hereby Notified that the undersigned will appear before the Honorable John P. Barnes, in the courtroom usually occupied by him in the Federal Courthouse, in Chicago, Illinois, at the hour of 10:00 A.M. on Tuesday, December 19, 1944, and then and there move for a modification of the order entered herein on December 15, 1944, a copy of which said Motion is attached hereto for your convenience.

Harold R. Schradzke,
Attorney for Stuart Solomon
Brown, Defendant.
33 N. La Salle St.
Chicago 2, Ill.

Received a copy of the above and foregoing Notice, together with a copy of Motion therein referred to, this 18th day of December, 1944.

J. Albert Woll, by
United States Attorney.
E. Tissler.

Filed
Dec. 19,
1944

144 On the 19th day of December, 1944, the defendant, Stuart Solomon Brown, filed a motion to modify the order entered on December 15, 1944, denying the defendants' amended motion for a new trial, which said motion was in words and figures as follows, to-wit:

145 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—No. 32,168)

MOTION TO MODIFY ORDER OF DECEMBER 15, 1944, DENYING DEFENDANTS' AMENDED MOTION FOR NEW TRIAL.

Now comes Stuart Solomon Brown, one of the defendants in the above entitled cause, by his undersigned attorney, and respectfully moves the Court to modify the order entered herein on, to-wit, December 15, 1944, denying the defendants' amended motion for a new trial, and in support of this motion to modify the said order, it is shown to the Court:

1. That the Court's order was predicated upon an opinion of the Court entitled "Memorandum" filed herein on December 15, 1944, wherein is set forth an alleged express admission of former counsel for William R. Johnson touching and concerning the ownership of the premises known as Albany Park Bank Building; that the Court deemed that admission to make consideration of motions for new trial absurd and fantastic.

This defendant respectfully shows to the Court that the attorney alleged to have made that statement on behalf of William R. Johnson did not then and does not now represent this defendant, and that anything said attorney might have admitted by inadvertence, by unfamiliarity with the facts of his case, or under any other circumstance,

could not and would not be binding in law or in good conscience upon this defendant, who was at all times represented by other counsel; that said other counsel did not join in and adopt the statement attributed by this Court to the attorney for William R. Johnson.

But this defendant further says that the statement attributed to the attorney for William R. Johnson was not relied upon either by the defendant, William R. Johnson nor by his attorney, nor by the Government and its attorneys, as an admission of any fact respecting the ownership or interest in Albany Park Bank Building, but that on the contrary the Government proceeded to establish by its witness, William Goldstein, alleged facts respecting the acquisition of said property for and on behalf of the said William R. Johnson, and the defendant, William R. Johnson, denied verbatim the said testimony of the said William Goldstein in that behalf.

2. Insofar as this defendant is concerned, the ownership of the Albany Park Bank Building was at all times the most significant evidence employed by the Government to establish its case against this defendant, Stuart Solomon Brown. It was the contention of the Government that the said William R. Johnson acquired Albany Park Bank Building to be the financial heart of an alleged gambling empire, and that he installed therein the said defendant Brown to act as a banker for that empire; furthermore, the Government used the witness Goldstein for 147 the testimony that Brown while a tenant in the Albany Park Bank Building, went to Goldstein who had leased him the space, for assistance in making a new bank connection; whereupon the Government has consistently argued that Brown's complicity in the scheme to aid Johnson stems from Johnson's ownership of Albany Park Bank Building, in which the said Brown ran a currency exchange. Thus the Government argues that Johnson bought the building for the purpose of setting up a currency exchange, and that Brown, by running the currency exchange in the particular building, aided and abetted Johnson in the alleged scheme to defraud the revenue.

That Goldstein perjured himself in his testimony respecting Albany Park Bank Building has been made manifest herein, but it is respectfully urged to the Court that irrespective of whether Goldstein did or did not perjure himself in respect to the transactions involving Al-

bany Park Bank Building at the original trial herein or by means of his supporting affidavits in opposition to defendants' motion for a new trial and amended motion for a new trial herein, yet, nevertheless, this defendant, Stuart Solomon Brown, is entitled to a new trial since the newly discovered evidence now before this Court establishes that William R. Johnson did not have an interest in Albany Park Bank Building during the period of time Stuart Solomon Brown was a tenant in those premises, namely in 1938 and 1939.

Wherefore, the defendant, Stuart Solomon Brown, moves the Court to modify the order of December 15, 1944, denying all of the defendants the amended motion for a new trial, by excepting this defendant from the provisions thereof and by granting to this defendant a new trial.

Stuart Solomon Brown,

Defendant.

By Harold R. Schradzke (Sgd.)

His Attorney.

148 Thereupon on the 19th day of December, 1944, the cause came on to be heard on the said defendant's motion to modify the order entered on December 15, 1944, denying the defendants' amended motion for a new trial, and the following proceedings were had:

149 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—No.....)

Proceedings had in the above entitled cause before the Hon. John P. Barnes, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, commencing on Tuesday, the 19th day of December, A. D., 1944, at 10:00 o'clock a. m.

Present:

Mr. J. Abert Woll, United States Attorney,

By: Mr. Richard G. Finn, Assistant United States Attorney, appeared for Plaintiff;

Mr. Harold R. Schradzke, appeared for Defendant.

150 Mr. Schradzke: Counsel for the Government is not present, your Honor.

The Court: Did you serve notice?

Mr. Schradzke: Yes, sir; I did.

The Court: Proceed.

Mr. Schradzke: My motion is on behalf of Stewart Solomon Brown, one of the co-defendants, your Honor, and it is to modify your Honor's order of December 15, entered herein.

The Court: What did the order say?

Mr. Schradzke: The order of December 15th denied the defendant's motion for new trial.

The Court: What is the particular part?

Mr. Schradzke: In respect to the defendant, Stewart Solomon Brown, I am asking that your order be modified so that it not pertain to Stewart Solomon Brown, but that instead that he be granted a new trial.

The Court: Have you a copy of the order?

Mr. Schradzke: Yes, your Honor.

The Court: What is wrong with the order? What part of the order do you complain of, other than the last part?

Mr. Schradzke: Your Honor now has a copy of it?

The Court: Yes.

Mr. Schradzke: Well, your Honor, in the memorandum opinion filed with this order, and upon which the order was in large part predicated it referred to the opening statement of former counsel for William R. Johnson, at the original trial, and referred to an admission said to have been made by that former counsel, Judge Thompson, in respect to the Albany Park Bank Building, in which your Honor pointed out that Thompson, referring to that property, said, and your Honor quotes the record your Honor had on it, the transcript of the record: "Mr. Johnson owned either the building, or an interest in the building, etc."

The Court: Is that the reason you want this motion modified?

Mr. Schradzke: That is only part of it, your Honor.

The Court: What is the other part?

Mr. Schradzke: What I am calling your Honor's attention to is the fact that at that time this defendant was represented by other counsel—

The Court: Oh, I know that.

Mr. Schradzke: And the remark would not be binding on him.

The Court: The remark was made in front of the jury, and it is on matters of that kind that juries decide cases.

152 Mr. Schradzke: That is the unfortunate part, your Honor, because that remark of counsel could not bind this defendant.

The Court: Your client then was represented by exceedingly competent counsel.

Mr. Schradzke: Yes, sir. Following that statement—

The Court: What other point?

Mr. Schradzke: May I pursue that?

The Court: No, no; I am not going to pursue that.

Mr. Schradzke: I wanted to point out that the parties did go ahead and make proof on that point. Therefore, under the authorities, I take it that the alleged admission would not be an admission binding upon anyone.

The Court: Any other point? I tell you I'm tired of this case!

Mr. Schradzke: Yes, your Honor.

The Court: What is it?

Mr. Schradzke: Insofar as the defendant, Stewart Solomon Brown, is concerned, the case of the Government against him at the trial developed in a very large measure on the Government's contention that William R. Johnson had purchased the property known as the Albany Park Bank Building.

153 The Court: I don't think there is any doubt about it.

He owned it. I have never had any doubt about it. You must bear in mind that your client at the trial of this case, did not put forth facts; they concealed everything they could. They only admitted what they thought they had to admit.

What else? I mean, in the trial of this case, what else have you?

Mr. Schradzke: The point, your Honor, that I wanted to point out was that irrespective of—

The Court: You say that they went on and put in proof. What else have?

Mr. Schradzke: That the showing recently made by the—

The Court: Your showing recently made was absurd.

Mr. Schradzke: I wanted to develop that before your Honor to show that—

The Court: Any other point?

Mr. Schradzke: Yes, I wanted to make the point that irrespective of the perjury of Goldstein, it once having been shown that the Albany Park Building had not been purchased by Johnson, that it was not owned by him—

154 The Court: You haven't shown that. The evidence is overwhelming that it was. He said he did. His counsel said he did.

Mr. Schradzke: That would not be binding upon this co-defendant.

The Court: That point was passed on.

Mr. Schradzke: Those are the points.

The Court: Motion denied.

Mr. Schradzke: May we take an exception to that?

The Court: Yes. What is that?

Mr. Schradzke: That is the motion.

The Court: Let me see it. All right; let it be filed.

(Which were all the proceedings had in the above entitled cause on the above-mentioned date.)

155 State of Illinois }
County of Cook } ss.

James K. Perkins, being first duly sworn, on oath deposes and says that he is and has been for many years last past a shorthand reporter practicing his profession in the City of Chicago, Illinois; that he reported the above and foregoing proceedings before Judge John P. Barnes on the 19th day of December, A. D. 1944, in the case of *United States of America v. Johnson, et al.*, and that the same is a true and correct transcript of what transpired at said time and place.

James K. Perkins.

Subscribed and sworn to before me this 3d day of January, A. D. 1945.

Thomas Lewis,
Notary Public.

(Seal)

157 Thereupon on the 19th day of December, 1944, the Court entered an order denying the said motion of defendant, Stuart Solomon Brown, to modify the order entered on December 15, 1944, denying the defendants' amended motion for a new trial, to the entry of which said order an exception was duly taken.

Entered
Dec. 19,
1944

158 Thereupon on the 21st day of December, 1944, there was filed a notice of appeal of the defendant, William R.

Johnson, which said notice of appeal was in words and figures as follows, to-wit:

Filed
Dec. 21,
1944

159 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

United States of America

v.

William R. Johnson, Jack Sommers,
James A. Hartigan, William P.
Kelly and Stuart Solomon Brown

No. 32,168

NOTICE OF APPEAL

The appellant, William R. Johnson, lives at Sunnyside Stock Farm, Lombard, DuPage County, Illinois.

The appellant's attorneys are William J. Dempsey, Bowen Building, Washington, D. C. and Homer Cummings, 1616 K. Street, Northwest, Washington, D. C.

The offense charged is evasion of payment of income taxes for the years 1936, 1937, 1938 and 1939, and participation in a conspiracy to effectuate such evasion.

Judgment of conviction on all of the above counts was entered October 23, 1940, and the appellant, William R. Johnson, was sentenced to five years imprisonment on the first, second, third and fourth counts, and two years imprisonment on the fifth count, such sentences to run concurrently, and to pay a fine of \$10,000.00 on each of the five counts, a single payment of \$10,000.00 to discharge all fines.

The appellant is now on bail.

The appellant, after remand of the case pursuant to Rule 2(3) of the Criminal Appeals Rules, filed and presented to the District Court his motion for a new trial, based on newly discovered evidence, which motion for new trial was denied on December 31, 1943. The appeal of this appellant on the original judgment of conviction is pending.

160 On appeal from the order of this Court denying the motion for a new trial, the Circuit Court of Appeals for the Seventh Circuit on May 6, 1944, entered its judgment affirming the denial of defendant's motion. On November

16, 1944, the Circuit Court of Appeals for the Seventh Circuit by order vacated its judgment affirming the order of the District Court denying defendant's motion for new trial, remanded the cause with directions to consider and dispose of defendant's motion when and if filed, and authorized and instructed the District Court to pass upon defendant's Amended Motion for a New Trial and certify its ruling to the Circuit Court of Appeals for the Seventh Circuit. A copy of the order of the Circuit Court of Appeals for the Seventh Circuit was filed in the office of the Clerk of the District Court on November 28, 1944. On December 13, 1944, this Court entered its order and judgment denying defendant's Amended Motion for a New Trial.

I, William R. Johnson, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the judgment of the District Court denying the Amended Motion for a New Trial.

(Sgd) William R. Johnson, Appellant

Dated this 21st day
of December, 1944.

Grounds of Appeal:

1. The order denying new trial is an abuse of discretion on the part of the trial court.

161 2. The order of denial is based upon inapplicable principles of law.

3. The decision of the trial court fails to follow controlling principles of law under decisions of the United States Circuit Courts of Appeals for the Seventh Circuit and for other circuits.

4. The order of denial, predicated upon the memorandum opinions of the trial judge, is in conflict with the controlling law of this case as determined by the order of the United States Circuit Court of Appeals for the Seventh Circuit remanding the cause pursuant to Rule 2(3) of the Criminal Appeals Rules.

5. The order of denial as indicated in the memorandum opinions of the trial judge was predicated upon a re-examination of matters decided by the United States Circuit Court of Appeals for the Seventh Circuit in entering its first and second orders of remand, and upon conclusions

reached as a result of such re-examination which conclusions in effect hold the orders of remand to be erroneous as a matter of law.

6. The decision of the trial court is erroneous as a matter of law.

7. The decision of the trial court errs as to matters of fact.

8. The decision of the trial court, as appears from its memorandum opinions, is founded upon and controlled by propositions of law in conflict with the law of this case.

9. The order of denial is, as the memorandum opinions disclose, founded upon a basic misconception of the province of the trial court and the extent of the discretion of that court under the orders of remand.

162 10. The memorandum opinions disclose that the trial court failed to exercise the judicial discretion invoked by the Amended Motion for a New Trial and did not give to the decision of the case the consideration to which defendant was entitled under law.

Filed
Dec. 21,
1944

163 On the 21st day of December, 1944, there was filed a notice of appeal of the defendants, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, which said notice of appeal was in words and figures as follows, to-wit:

164 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

United States of America

vs.

William R. Johnson, Jack Sommers,
James A. Hartigan; William P. Kelly
and Stuart Solomon Brown.

No. 32,168

NOTICE OF APPEAL

The appellant, Jack Sommers, lives at 1205 West Sherwin Avenue, Chicago, Illinois.

The appellant, James A. Hartigan, lives at 2825 South Maple Avenue, Berwyn, Illinois.

The appellant, William P. Kelly, lives at 130 West Washington Blvd., Oak Park, Illinois.

The appellant, Stuart Solomon Brown, lives at 4901 North Christiana Avenue, Chicago, Illinois.

The appellants' attorneys are Harold R. Schradzke, 33 North LaSalle Street, Chicago, Illinois, and Homer Cummings, 1616 K. Street, N.W., Washington, D. C.

The offense charged is aiding and abetting one William R. Johnson to wilfully attempt to evade payment of income taxes for the years 1936, 1937, 1938 and 1939, except in the instance of Stuart Solomon Brown, who was charged only as to the years 1938 and 1939, and participation in conspiracy to effectuate such evasion was charged as to all appellants.

Judgment of conviction on all of the above counts was entered October 23, 1940, and the appellant, Jack Sommers was sentenced to four years imprisonment on each of the first, second, third and fourth counts, and two years imprisonment on the fifth count, such sentences to run concurrently, and to pay a fine of \$8,000.00 on each of the five counts, a single payment of \$8,000.00 to discharge all fines; and the appellant, James A. Hartigan, was sentenced to three years imprisonment on each of the first, second, third and fourth counts, and two years imprisonment on the fifth count, such sentences to run concurrently, and to pay a fine of \$6,000.00 on each of the five counts, a single payment of \$6,000.00 to discharge all fines; and the appellant, William P. Kelly, was sentenced to four years imprisonment on each of the first, second, third and fourth counts, and two years imprisonment on the fifth count, such sentences to run concurrently, and to pay a fine of \$8,000.00 on each of the five counts, a single payment of \$8,000.00 to discharge all fines; and the appellant, Stuart Solomon Brown, was sentenced to two years imprisonment on each of the third, fourth and fifth counts, such sentence to run concurrently, and to pay a fine of \$4,000.00 on each of the third, fourth and fifth counts, a single payment of \$4,000.00 to discharge all fines.

The appellants are now on bail.

The appellants filed their motion for a new trial based on newly discovered evidence and presented to the District Court after remand of the case pursuant to Rule 2(3) of the Criminal Appeals Rules, which motion for such new

trial was denied on December 31, 1943. The appeal of these appellants on the original judgment of conviction is pending.

166 Thereafter appellants perfected their appeal to the

Circuit Court of Appeals for the Seventh Circuit from the order of this Court denying the motion for a new trial, and the Circuit Court of Appeals for the Seventh Circuit affirmed the District Court's denial of defendants' motion. Defendants filed a Petition for Certiorari in the Supreme Court of the United States requesting review of the judgment of the Circuit Court of Appeals; during the pendency of that petition the Solicitor General in a memorandum to the Supreme Court advised the Supreme Court that William Goldstein had procured and had filed certain income tax returns on behalf of his son, Theodore Goldstein, disclosing complete legal and equitable ownership in Theodore Goldstein of a certain property known as Albany Park Bank Building, from the year 1937 thence forward. Upon such disclosure defendants' request that copies of the said returns be filed in the proceedings in the Supreme Court was denied; defendants thereupon moved the Supreme Court that action on the Petition for Certiorari be deferred until appropriate action could be taken in the Circuit Court of Appeals for the Seventh Circuit, namely, the filing of a petition to set aside the last above referred to judgment of the Circuit Court of Appeals and the vacation of the order of this Court denying the motion for a new trial and other procedure, to the end that the motion for a new trial heretofore filed be amended to include the above referred to returns and such other matter as was proper under the circumstances; this motion was granted by the Circuit Court of Appeals on November 16, 1944,

and a copy of that order was filed in the office of the 167 Clerk of the District Court on November 28, 1944. On

December 4, 1944, defendants filed their Amended Motion for a New Trial with the Clerk of this Court, pursuant to order and direction of the District Court theretofore entered; answer was filed by the Government on December 7, 1944, and reply thereto by the defendants on December 11, 1944, on which last mentioned date the Court heard argument in open Court deferring his ruling on the motion until December 15, 1944. On December 15, 1944, the District Court denied defendants' Amended Motion for a New Trial. On, to-wit, December 19, 1944, the defendant,

Stuart Solomon Brown, moved the Court to modify the order of December 15, 1944, denying the Amended Motion for a New Trial, and filed his written motion to that end, which said written motion was on last mentioned date denied in open Court, to which denial an exception was taken.

We, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, the above named appellants, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the judgment of the District Court in denying the Amended Motion for a New Trial.

(Sgd) Jack Sommers

(Sgd) James A. Hartigan.

(Sgd) William P. Kelly

(Sgd) Stuart Solomon Brown

Dated this 21st day of December, 1944.

168

10 GROUNDS OF APPEAL

Appellants appeal from the order of the District Court of December 15, 1944, denying their Amended Motion for a New Trial, on the ground that the order denying the new trial was an abuse of discretion on the part of the Trial Court. The Trial Court's rejection of the evidence in support of defendants' motion was based upon erroneous application of inapplicable principles of law; the conclusions that defendants' evidence was not newly discovered and that defendants were not diligent were erroneous as a matter of law; the conclusion that all but a few items of defendants' evidence were merely cumulative and that the remaining items were merely impeaching was erroneous as a matter of law; the rejection of each of the affidavits rejected was erroneous as a matter of law and predicated upon a misconception, both of the law and of the facts; that the Court set up criteria as a predicate for denying the motion, which criteria are not and were not the law governing the case; that the order of denial by its terms in effect overrules the prior holdings and orders of the United States Circuit Court of Appeals heretofore entered in this cause with respect to proceedings under Rule 2(3) of the Criminal Appeals Rules, both as relating to the original motion for a new trial and the Amended

Motion for a New Trial; that said order of denial is predicated upon a memorandum of opinion of the Trial Court, the conclusions and statements of law of which memorandum are erroneous as a matter of law; that the District Judge in denying the Amended Motion for a New Trial accepted hearsay and rumor as a predicate for rejecting the legal and factual effect of the income tax returns of Theodore Goldstein; that the memorandum of law filed by the Court as a basis for the order denying the Amended Motion for a New Trial on its face discloses a misconception of the province and power of the Court in the exercise of the District Court's discretion and in the matter of rejecting the legal significance of the orders of the Circuit Court of Appeals herein.

Entered
Dec. 22,
1944

170 Thereupon on the 22nd day of December, 1944, this Court entered the following order, which order was in words and figures as follows, to-wit:

171 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois.
Eastern Division
* * (Caption—No. 32168) * *

Notice of appeal having been filed, It Is Ordered, that the Honorable J. Albert Woll, United States District Attorney, and Homer Cummings, Esq., William J. Dempsey, Esq., and Harold R. Schradzke, Attorneys for William R. Johnson, Jack Sommers; James A. Hartigan, William P. Kelly and Stuart Solomon Brown, appear before the judge of this court on Wednesday, December 27, 1944, at the hour of Ten o'clock A. M. in Room 653 United States Court House, Chicago, Illinois, in order that the judge may, at such time and place, give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings:

It Is Further Ordered that the Clerk of this Court forthwith transmit copies of this order, by United States Mail, to said Honorable J. Albert Woll, United States District Attorney, and to Homer Cummings, Esq., William J.

Dempsey, Esq., and Harold R. Schradzke, Esq., attorneys for said William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown.

John P. Barnes,
Judge

Dated: December 22, 1944.

172 Thereupon on the 27th day of December, 1944, this Court entered the following order, in words and figures, to-wit:

Entered
Dec. 27
1944

173 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 32168) * *

ORDER.

Notice of appeal having heretofore been filed by William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, and the Clerk of this Court having notified the trial judge of the filing of said notice of appeal, and the trial judge having directed the attorney for the appellants and the United States Attorney to appear before him on Wednesday, December 27, 1944 at the hour of 10 o'clock A.M. in Room 653 United States Court House, Chicago, Illinois, and it having been represented to the judge, upon behalf of the appellants, that the appeal is to be prosecuted not only upon the clerk's record of proceedings but also upon a bill of exceptions.

It Is Ordered: (1) That the appellants, within thirty (30) days after the taking of the appeal (filing with the clerk of this court a notice of appeal), procure to be settled and filed with the Clerk of this Court a bill of exceptions, setting forth the proceedings upon which the appellants wish to rely in addition to those shown by the clerk's record of proceedings: (2) that the appellants, within the same time, file with the clerk of this court an assignment of errors of which appellants complain.

John P. Barnes
Judge

Dated: December 27, 1944.

Filed
Jan. 13,
1945

174 Thereupon on the 13th day of January, 1945, the defendants filed a praecipe for record, which said praecipe for record was in words and figures as follows, to-wit:

175 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 32168) * *

PRAECIPE FOR RECORD.

To the Clerk of the District Court:

You are hereby requested to prepare a transcript of the record in the above entitled cause for the joint and several use of the defendants, William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to Notices of Appeal from the denial of the defendants' Amended Motion for a New Trial heretofore filed on behalf of said defendants, and to include in such transcript of record the following documents filed and orders entered in the said cause:

1. Petition of Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, filed on March 27, 1944, that they be permitted to take an appeal.
2. Petition of William R. Johnson filed on March 27, 1944, that he be permitted to take an appeal.
- 176 3. Order entered March 29, 1944, allowing said appeal by Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown.
4. Order entered March 29, 1944, allowing said appeal by William R. Johnson.
5. Certified copy of Order of United States Circuit Court of Appeals entered on November 16, 1944, remanding the cause to the District Court with directions to consider and dispose of the defendants' Amended Motion for a New Trial, which said certified copy of said Order was filed with the Clerk of this Court on November 28, 1944.
6. Order entered on November 28, 1944, that defendants file their motion on or before December 4, 1944.

and that the United States file its answer on or before December 7, 1944, and that the defendants file their reply on or before December 11, 1944, and setting the hearing on the said motion for December 11, 1944.

7. Notice and Motion of defendants for production of documents filed on November 30, 1944.
8. Order entered on November 30, 1944, for production of documents and the filing of certified copies thereof in the Clerk's office.
9. Notice and Amended Motion for a New Trial and exhibits attached to and forming part of said Amended Motion for a New Trial, filed on December 4, 1944.
10. Notice and Government's Answer to Defendants' Amended Motion for a New Trial, filed on December 7, 1944.
11. Notice and Defendants' Reply to Government's Answer to the Amended Motion for a New Trial, filed on December 11, 1944, and affidavit of the defendant, William R. Johnson, attached thereto.
12. Transcript of record and two volumes of Bill of Exceptions from United States Circuit Court of Appeals, filed on December 11, 1944.
13. Order entered December 15, 1944, denying and overruling defendants' Amended Motion for a New Trial.
14. Memorandum of Court filed on December 15, 1944.
15. Notice and Motion of defendant, Stuart Solomon Brown, to modify order of December 15, 1944, filed on December 19, 1944.
16. Order entered on December 19, 1944, denying Motion of defendant, Stuart Solomon Brown, to modify order of December 15, 1944.
17. Notice of Appeal of William R. Johnson filed on December 21, 1944.
18. Notice of Appeal of Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, filed on December 21, 1944.
19. Order entered on December 22, 1944, directing that the parties appear on December 27, 1944, for directions with regard to the preparation of the record on appeal.
20. Order entered on December 27, 1944, that the defendants, within thirty days from the filing of their Notices of Appeal, procure to be settled and filed with

the Clerk of this Court, a Bill of Exceptions, and to file an Assignment of Errors within the same time.

21. Praecipe for Record and proof of service thereof.
22. Assignment of Errors.
23. Notice and Motion to Settle Bill of Exceptions.
24. Bill of Exceptions.
25. Order signing, authenticating and certifying Bill of Exceptions.
26. Complete statement of docket entries from October 16, 1943.

Dated January 13, 1945.

(sgd) *Homer Cummings*
Homer Cummings,

*Attorney for William R. Johnson,
Jack Sommers, James A. Hartigan,
William P. Kelly and Stuart
Solomon Brown, Defendants.*

(sgd) *William J. Dempsey*
William J. Dempsey,

*Attorney for William R. Johnson,
Defendant.*

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(sgd) *Harold R. Schradzke*
Harold R. Schradzke,

*Attorney for Jack Sommers, James
A. Hartigan, William P. Kelly
and Stuart Solomon Brown, De-
fendants.*

Filed
JAN. 17,
1945

179 Thereupon on the 17th day of January, 1945, the defendants filed Assignment of Errors, which Assignment of Errors was in words and figures as follows, to-wit:

180 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

(Caption—No. 32168)

ASSIGNMENT OF ERRORS.

Now come the defendants, William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, by their undersigned attorneys, and hav-

ing appealed from the order and judgment of the United States District Court for the Northern District of Illinois, Honorable John P. Barnes presiding, denying defendants' amended motion for a new trial to the United States Circuit Court of Appeals for the Seventh Circuit, say that in the proceedings herein and in the orders and judgments herein there are manifest errors, and each of such defendants severally makes the following assignments of error, which he alleges were committed in the proceedings on the defendants' amended motion for a new trial:

1. The Court erred in applying to this case and to his determination thereof and order ^{therein}, an inapplicable rule of law as the basis for his legal conclusions and as a guide thereto, and thus further erred in denying and rejecting the law as laid down by the Circuit Court of Appeals of this and other circuits and by the Supreme Court of the United States.

181 2. The Court erred in overruling and denying defendants' amended motion for a new trial.

3. The Court erred in finding and concluding that none of the items of newly discovered evidence submitted by the defendants in support of their amended motion for a new trial, including the newly discovered evidence submitted by the defendants in support of their original motion for a new trial filed on October 29, 1943 (hereinafter referred to as "original motion for a new trial"), constituted newly discovered evidence warranting a new trial.

4. The Court erred in finding and concluding that all but a few items of the evidence submitted by the defendants in support of their amended motion for a new trial, including the evidence submitted by the defendants in support of their original motion for a new trial, were merely cumulative of other like items presented at the trial.

5. The Court erred in finding and concluding that there had been delay in presenting any of the items improperly designated by it as "merely cumulative".

6. The Court erred in finding and concluding that defendants had not been diligent as to those items improperly designated by it as "merely cumulative".

7. The Court erred in finding and concluding that no adequate reason had been presented for not having sooner presented any or all of those items improperly designated by it as "merely cumulative".

182 8. The Court erred in its view of the purpose and effect of the affidavits and other evidence which it im-

properly designated as "merely cumulative", and in refusing on the ground that the matters covered by the affidavits and other evidence were not material, to consider the facts therein as bearing on the amended motion for a new trial.

9. The Court erred in finding and concluding that all of the items submitted in support of the defendants' amended motion for a new trial, including all of the items submitted in support of the defendants' original motion for a new trial, other than those improperly designated by it as "merely cumulative" were merely impeaching.

10. The Court erred in finding and concluding that the defendants had not been diligent as to those items improperly designated by it as "merely impeaching".

11. The Court erred in finding and concluding that no adequate reason had been presented for not having sooner presented any or all of those items improperly designated by it as "merely impeaching".

12. The Court erred in concluding that the defendants were not taken by surprise by Goldstein's false testimony.

13. The Court erred in concluding that the defendants could have produced at the trial the evidence offered in support of the amended motion for a new trial, including the evidence offered in support of the original motion for a new trial but chose not to do so.

14. The Court erred in finding and concluding that the defendants had not presented adequate reason for not having sooner submitted the affidavit testimony of the defendant Johnson, John Elmer Johnson, Hess and Fowler.

15. The Court erred in finding and concluding that the affidavit testimony of Green in support of the defendants' amended motion for a new trial and in support of the defendants' original motion for a new trial is inherently improbable.

16. The Court erred in finding and concluding that the affidavit testimony of Green because of its source was not worthy of belief.

17. The Court erred in finding and concluding that the affidavit testimony of the defendant Johnson, John Elmer Johnson, Hess and Fowler because of its source was not worthy of belief.

18. The Court erred in finding and concluding that Goldstein, a principal and material Government witness, has not recanted his testimony that Johnson gave him the money to purchase for Johnson the properties known as

Bon Air, the White House, the Green House, the Gas Station, the Dells, the Curran Farm, 9730 Western Avenue and the Albany Park Bank Building, and to place in escrow toward the purchase of the Columbian Garden property the sums of \$7,500 and \$10,000.

19. The Court erred in finding and concluding that Goldstein did not testify falsely on the trial in testifying that Johnson had given him the money to purchase the properties known as the Bon Air, the White House, the Green House, the Gas Station, the Dells, the Curran Farm, 9730 Western Avenue and the Albany Park Bank Building, and to place in escrow toward the purchase of the Columbian Garden property the sums of \$7,500 and \$10,000, and that he purchased said properties and made said deposits for defendant Johnson.

20. The Court erred in finding and concluding that Goldstein's testimony concerning the source of the currency used by him in the purchase and proposed purchase of 184 the properties known as the Bon Air, the White House, the Green House, the Gas Station, the Dells, the Curran Farm, 9730 Western Avenue, Columbian Gardens, and the Albany Park Bank Building, is corroborated by any facts or circumstances in evidence at the trial.

21. The Court erred in finding and concluding that Goldstein's testimony is corroborated by any facts or circumstances in evidence at the trial with respect to the use or keeping of currency on hand by defendant Johnson.

22. The Court erred in finding and concluding that any acts or things done by Goldstein in connection with the purchase of the Sunny Acres Farm by Johnson in any way corroborates Goldstein's testimony.

23. The Court erred in finding and concluding that deliberately false statements in Goldstein's affidavits denying Green's testimony in any way detracted from such testimony or made it less worthy of belief.

24. The Court erred in finding and concluding that Goldstein on the trial (with the exception of the source of the currency that he deposited in the various escrows) told only what the various escrow papers and records compelled him to tell.

25. The Court erred in disregarding applicable decisions of this Court and of the Supreme Court of the United States and of various Circuit Courts of Appeals and applying in his denial of the amended motion for a new trial precedent and rules of law having no application to the legal questions presented by the motion.

26. The Court erred in not giving appropriate consideration to the evidence presented in support of the amended motion for a new trial, including the evidence presented in support of the original motion for a new trial.

185 27. The Court erred in misconceiving and mistating in his memorandum opinion filed herein on December 15, 1944 and in his memorandum opinion filed on December 28, 1943, the defendants' contentions and position on their amended motion for a new trial.

28. The Court erred in denying defendants' amended motion for a new trial on the basis of the erroneous and inapplicable principles of law adopted in his memorandum opinion filed on December 15, 1944, and in his memorandum opinion filed on December 28, 1943.

29. The Court erred in not correctly applying so much of the principles of law adverted to in his memorandum filed on December 15, 1944, and in his memorandum filed on December 28, 1943, as have any application to the facts presented on the defendants' amended motion for a new trial.

30. The Court erred in denying the amended motion for a new trial on the basis of a misapprehension as to the purpose and effect of the facts and evidence at the trial of this case as is exhibited in his memorandum filed on December 15, 1944, and as is exhibited in his memorandum filed on December 28, 1943.

31. The Court erred in denying the amended motion for a new trial on a plain misapprehension and mistake as to the purpose and effect of the facts presented on the amended motion for a new trial as is exhibited by his memorandum filed on December 15, 1944, and by his memorandum filed on December 28, 1943.

32. The Court erred by misconceiving and mistaking the facts demonstrated by the evidence at the trial and on the amended motion for a new trial and on the original motion for a new trial.

186 33. The Court erred in denying the amended motion for a new trial for reasons and on grounds beyond his jurisdiction and discretion under the order entered by the Circuit Court of Appeals on October 15, 1943, remanding the case.

34. The Court erred in denying the amended motion for a new trial for reasons and on grounds beyond his jurisdiction and discretion under the order entered by the Circuit Court of Appeals on November 16, 1944, remanding the case.

35. The Court erred in denying the amended motion for a new trial in that the said denial is based not upon the exercise of any discretion by the trial court but upon the application of inapplicable principles of law, and upon the application of erroneous principles of law.

36. The Court erred in denying the amended motion for a new trial in that his denial constitutes a clear abuse of his discretion.

37. The Court erred in basing his denial of the amended motion for a new trial upon the erroneous and inapplicable finding and conclusion that the newly discovered evidence offered by the defendants in support of their amended motion for a new trial, including newly discovered evidence offered by the defendants in support of their original motion for a new trial, is not of such a nature as would probably produce an acquittal on a new trial.

38. The Court erred in denying the defendants' amended motion for a new trial in that it erroneously excluded from its consideration of the motion matters which were appropriate to a decision on the motion.

187 39. The Court erred in holding in effect that the evidence in support of the amended motion for a new trial, including the evidence in support of the original motion for a new trial, was insufficient to reasonably establish that Goldstein testified falsely as to material matters.

40. The Court erred as a matter of law in finding that the evidence supporting the amended motion for a new trial, including the evidence supporting the original motion for a new trial, did not warrant a new trial.

41. The Court erred in not finding that without Goldstein's false testimony the jury might have reached a different conclusion.

42. The Court erred in holding in effect that the defendants were not prejudiced by Goldstein's false testimony.

43. The Court erred in its failure to hold as a matter of law that the affidavits and exhibits submitted by the defendants in support of their amended motion for a new trial disclosed and demonstrated false testimony of the witness Goldstein to the prejudice of the defendants and each of them in respect to material matters.

44. The Court erred in disregarding the order of remand of the Circuit Court of Appeals entered on October 15, 1943, and its legal consequences.

45. The Court erred in disregarding the order of remand of the Circuit Court of Appeals entered on November 16, 1944, and its legal consequences.

46. The Court erred in basing his denial of the amended motion for a new trial upon his consideration of and conclusion on the question of diligence in the presentation of evidence which the defendants had presented to the United States Circuit Court of Appeals in support of their motion for remand.

188 47. The Court erred in basing his denial of the amended motion for a new trial upon his reexamination of the question of diligence in the presentation of the evidence submitted in support of the defendants' amended motion for a new trial, which question had been decided by the United States Circuit Court of Appeals in entering its order of remand of October 15, 1943 and in entering its order of remand of November 16, 1944 and upon conclusions reached as a result of such reexamination, which conclusions in effect hold the said orders of remand to be erroneous as a matter of law.

48. The Court erred in basing his denial of the amended motion for a new trial upon his consideration of and conclusion concerning the question of whether evidence submitted by the defendants to the United States Circuit Court of Appeals in support of their motion for remand was "merely cumulative".

49. The Court erred in basing his denial of the amended motion for new trial upon his reexamination of the question of whether the evidence submitted by the defendants in support of their amended motion for new trial was "merely cumulative", which question had been decided by the United States Circuit Court of Appeals in entering its order of remand of October 15, 1943 and in entering its order of remand of November 16, 1944, and upon conclusions reached as a result of such reexamination, which conclusions in effect hold the said orders of remand to be erroneous as a matter of law.

50. The Court erred in basing his denial of the amended motion for a new trial upon his conclusion that the evidence submitted by the defendants to the United States Circuit Court of Appeals in support of their motion for remand was "merely impeaching".

189 51. The Court erred in basing his denial of the amended motion for a new trial upon his reexamination of the question of whether the evidence submitted by the defendants in support of their amended motion for new trial was "merely impeaching", which question had been decided by the United States Circuit Court of Appeals in entering its order of remand of October 15, 1943 and in entering its

order of remand of November 16, 1944 and upon conclusions reached as a result of such reexamination that it was "merely impeaching", which conclusions in effect hold the said orders of remand to be erroneous as a matter of law.

52. The Court erred in holding in his decision that the evidence presented to the United States Circuit Court of Appeals in support of the defendants' motion for remand was not presented in good faith.

53. The Court erred in disregarding and ignoring the precedent set by the Supreme Court herein by its refusal to consider the unverified and unauthenticated stenographic notes on the objection that they were unverified, unauthenticated and inaccurate.

54. The Court erred in not giving defendants' amended motion for a new trial proper and appropriate consideration as is evidenced by patent mistakes and misstatements in his memorandum filed on December 15, 1944, and as evidenced by patent mistakes and misstatements in his memorandum filed on December 28, 1943, as to defendants' position and contentions on the amended motion for a new trial, and as to the purpose, meaning and effect of testimony at the trial and evidence in support of the amended motion for a new trial, and as to facts plainly appearing in the record.

190 55. The Court erred in his consideration and disposition of the amended motion for a new trial in that he acted in a prejudiced, biased and nonjudicial manner as is evidenced by the improper and unfounded statements in his memorandum filed on December 15, 1944, and in his memorandum filed on December 28, 1943, concerning the good faith of defendants, and as evidenced by his arbitrary and unreasonable demand that counsel for defendants undertake and complete the physically impossible task of pointing out in five days' time all of the many errors in the admittedly inaccurate, unverified and unauthenticated stenographic notes of the trial which were not relied upon by either the defendants in support of, nor the Government in opposition to, the amended motion for a new trial.

56. The Court erred in concluding that the filing of the income tax returns of Theodore Goldstein for the years 1937 to 1943, both inclusive, cannot fairly be considered without at the same time considering the alleged circumstances of their filing.

57. The Court erred in concluding that the said alleged circumstances negative any possibility of its being reasonably contended that the filing of the said income tax returns by Theodore Goldstein can be held to be any evidence that

during the years in question he had some interest in the Albany Park Bank Building other than as the holder of the bare legal title.

58. The Court erred in concluding and holding that the said income tax returns are excluded from the classification of newly discovered evidence warranting a new trial.

59. The Court erred in concluding and holding that the said income tax returns are "cumulative only".

191 60. The Court erred in relying, and basing its conclusions and findings, upon hearsay, rumor and uncorroborated statements contained in the affidavits submitted by the Government in opposition to the amended motion for a new trial.

61. The Court erred in denying the motion of defendant Brown, filed December 19, 1944, to modify the order of December 15, 1944, denying the amended motion for a new trial.

62. The Court erred in failing to hold that the evidence submitted on the amended motion for a new trial, including that submitted on the original motion for a new trial, establishes that defendants were deprived of their right to a fair trial.

And by reason of said errors and other manifest errors appearing in the record herein, the defendants pray that the order overruling and denying defendants' amended motion for a new trial be set aside and a new trial ordered for all of the defendants.

William R. Johnson,

Defendant

By (Signed) *Homer Cummings*

(Signed) *William J. Dempsey*

His Attorneys

Jack Sommers, James A. Hartigan,
William P. Kelly and Stuart Solomon
Brown,

Defendants

By (Signed) *Homer Cummings*,

(Signed) *Harold R. Schradzke*

Their Attorneys.

192 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

• • (Caption—No. 32,168) • •

CERTIFICATE OF COURT AS TO VOLUME IX
OF THE BILL OF EXCEPTIONS.

The foregoing Volume IX of the Bill of Exceptions herein to which this certificate is appended and attached, correctly, accurately and truthfully shows and contains the proceedings had herein that are set forth and referred to in said Volume IX of said Bill of Exceptions, which said proceedings are as follows:

Memorandum opinion of Court filed on December 15, 1944.

Order entered December 15, 1944, denying and overruling defendants' amended motion for a new trial. Minutes of proceedings had on December 15, 1944, in which Court allowed appeal.

Notice and motion to modify order of December 15, 1944.

Minutes of proceedings had on December 19, 1944, in which Court denied motion to modify.

Notice of appeal of William R. Johnson.

Notice of appeal of Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown.

Order entered on December 22, 1944, that parties appear for directions with regard to the preparation of record on appeal.

193 Order entered on December 27, 1944, prescribing time within which Bill of Exceptions is to be settled and filed, and Assignment of Errors is to be filed.

Praeceptum for record.

Assignment of Errors.

and the foregoing said Volume IX of the said Bill of Exceptions is correct and accurate in all respects and is hereby settled, approved, allowed and authenticated as proper in form and as conforming to the truth, and is hereby made a part of the record in this case.

Dated January 19th, 1945.

John P. Barnes,

United States District Judge.

194 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 32,168) * *

CERTIFICATE OF COURT AS TO BILL OF
EXCEPTIONS.

The foregoing Bill of Exceptions in nine volumes, duly proposed by the defendants, William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, and duly presented to the Court within the time allowed by law and by the rules and orders of this Court and of the United States Circuit Court of Appeals for the Seventh Circuit, after due notice to the United States Attorney, contains all of the evidence submitted in support of, and in opposition to, the defendants' amended motion for a new trial, and all motions, objections and rulings, orders, and the memorandum opinions of the Court, which are the basis of the assignment of errors, and the said Bill of Exceptions in nine volumes is hereby settled, approved, allowed, signed and authenticated as in the proper form and as conforming to the truth, and is the true Bill of Exceptions herein, and is hereby made a part of the record in this case.

195 It Is Further Ordered that the said Bill of Exceptions in nine volumes, and the assignment of errors forming part thereof, shall be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, together with a certificate certifying the said Bill of Exceptions in nine volumes as part of the record in this case.

Dated January 19th, 1945.

John P. Barnes,
United States District Judge.

The complete statement of the docket entries in said cause since October 16, 1943 as requested in Appellants praecipe for record filed January 13, 1945 are as follows:

DATE	FILINGS—PROCEEDINGS
1943	
Oct. 16	Filed Certified Order of U. S. Circuit Court of Appeals as to Wm R Johnson and Jack Sommers
Oct 19	Filed Notice and Motion—Wm J. Dempsey and Harold R. Schradzke Attys for defts Sommers, Hartigan, Flanagan, Wm P. Kelly and Stuart Solomon Brown.
Oct 19	Order that defts may file motion for a new trial on or before Oct 29, 1943 and that Gov't may reply thereto on or before Nov 9, 1943. (draft) Hrg on motion for new trial and reply set for Nov 15, 1943 Barnes, J
Oct 18	Filed appearance for Wm R Johnson—William J. Dempsey Atty
Oct 18	Filed appearance of Harold R Schradzke as additional counsel for defts Jack Sommers, James A Hartigan, Wm P. Kelly and Stuart Solomon Brown
Oct 28	Filed Transcript from Circuit Court of Appeals
Oct 29	Filed Motion—Wm J. Dempsey and Harold R. Schradzke Attys
Oct 29	Filed Motion for New Trial Pursuant to Rule 2(3) of the Criminal Appeals Rules & Brief In Support Thereof—Wm J. Dempsey and Harold R. Schradzke Attys for Defts
Oct 29	Filed Appendix to Defendants' Brief In Support of Motion for a New Trial
Nov 9	Filed Answer To The Defendants' Motion For New Trial and Government's Exhibits Nos 23 and 24—U. S. Atty
Nov 9	Filed Brief Of The Government In Opposition To Motion For New Trial—U. S. Atty
Nov 12	Filed Reply Brief Of Defendants On Motion For New Trial—Dempsey and Schradzke Attys for Defts
Nov 12	Filed Defendants' Counter Affidavits Nos. 72 and 73
Nov 15	Argmts hrd and concluded Order transcript of proceedings produced by defts' counsel and transcript of proceedings produced by U. S. Atty impounded with

the Clerk of this Court Order that 'defts' counsel point out any inaccuracies in said transcripts within 5 days from this date Rule on parties to file original affidavits with the Clerk of this Court and motion of defts for new trial taken under advisement on papers filed and affidavits on papers to be filed—Barnes, J.

Nov 15 Filed affidavits of Jos Shafron, (2) affidavits of Walter (Buck) Henrichsen, Helen Henrichsen, Jos J. Nadherney, Maurice Green, (2) William Schwefer (2) Roy Loyé, Jos J. Spérling, John W. Garry, Edward Papin, Jacob Leo Smith, Eli Herman, (2) Samuel Hare, Walter Piper, Alice Kemp, Frederic P. Kirschner, Walter Peters, Edward J. Hess, Deposition of J. Lawrence Holleran, and John W. Guild, Letter of Wm Merrill, Affidavit of Nate Jacobs, Albert Hoffman, (3) Beatrice Marsh, Marian Giles Sommer, (4) John S. Piazza, Albert Tatge, Charles R. Barrett, Herbert "Scotty" Irwin, Lester Weil, Phil Tyrrell, Joe Bauernfeind, Fred L. Huscher, John G. Wagner with record sheet attached of the Sinclair Refining Co.

Receipt of William Goldstein, Affidavit of Gerald J. Berkley, Stewart Peters, Wm R. Peacock, Pearl Ferguson, Marie Schmidt, John Schmidt, Certified copy of Appointment Of Successor Trustee signed by Wm Goldstein, Affidavit of Leo Blockus, Letter from Logan Square Realty & Currency Exchange signed by Leon J. Levine, Photostatic Copy of Agreement of Hines Realty & Construction Co signed by Theodore Goldstein, Photostatic Copy of Letter and Certificate of Insurance of Nate Jacobs & Company, Affidavits of Frank T. Fowler, Maurice Green, Rt Rev Msgr D. F. Frawley, Harry Bell, Robt P. Sullivan, John E. Johnson, Letter signed by Geo F. Sullivan, U. S. Atty, affidavit of Betty J. Will, Walter Peters, Leon Levine, Clarence Engelbretson, Wm R. Johnson (2) Certified copies of Searches signed by Jay B. Morse County Clerk, Waukegan Ill and L. J. Wilmos Clerk of Circuit Court Waukegan, Ill.

Nov 17 Filed Answer to Defendant's Motion For Remand and Analysis Of Material Filed By Defendants In Support Of Their Motions To Remand The Above Entitled Cases certified by the C. C. A.

- Nov 17 Filed Additional Affidavits And Supported Documents In Opposition To Defendants' Motions For Remand And In Reply To Defendants' Reply to Government's Answer To Defendants' Motion For Remand and Certified by C. C. A.
- Nov 17 Filed Letter From Rev Lawrence W. Frawley marked Ex #32 and Quitclaim deed and lease for Albany Park Bank Bldg filed as exhibit #23
- Dec 28 Filed Memorandum of the Court
- Dec 29 Order praecipes for subpoenas filed by defts, subpoenas issued on behalf of defts and orders directing issuance of subpoenas impounded with the Clerk of this Court Barnes, J
- Dec 31 Order defts mo for a new trial overruled and denied (draft) Barnes, J
- Dec 31 Filed Notice of Appeal—Wm R Johnson by Wm J Dempsey Atty
- Dec 31 Filed Notice of Appeal of Jack Sommers, James A Hartigan, Wm P. Kelly, Stuart Solomon Brown Harold R. Schradzke Atty
- Dec 31 Copy of Opinion of Judge Barnes mailed to Atty General
- Dec 31 Order that Attys for parties appear Jan 3, 1944 at 10:00 A.M. for directions with respect to preparation of record on appeal (2 drafts) Barnes, J
- 1944
- Jan 3 Order that Bill of Exceptions be procured for settling and filing and that Assignment of Errors be filed within 30 days from taking of appeal (2 drafts) Barnes, J
- Jan 22 Filed Notice and Praecipe For Record—Wm J. Dempsey and Harold R. Schradzke Attys
- Jan 22 Filed Notice and Assignment Of Errors—Wm J. Dempsey and Harold R. Schradzke Attys
- Jan 22 Filed Notice and Motion To Settle Bill of Exceptions—Wm J. Dempsey and Harold R. Schradzke Attys for defts
- Jan 26 Order appendix to defts Brief in support of motion for new trial substituted for certain original exhibits (draft) Barnes, J
- Jan 28 Bill of Exceptions of defts in seven volumes settled, approved, signed and filed—Barnes, J

- Jan 29 Issued Transcript to C. C. A.
- Mar 27 Filed (2) Petitions for Allowance of Appeal Wm J. Dempsey and Harold R. Schradzke Attys
- Mar 29 Order allowing appeal to Wm R. Johnson (draft)
Order allowing appeal to Jack Sommers, et al (draft)
Barnes, J
- Nov 28 Filed Certified Copy Of Order Of Circuit Court of Appeals entered Nov 16, 1944
- Nov 28 Order on deft to file papers on or before Dec 4 1944 that U. S. file on or before Dec 7, 1944 such answer as it may deem necessary and advisable that defts file reply before 10 A.M. Dec 11, 1944 and hrg set for Dec 11, 1944—10 A.M. That Clerk of Court forthwith mail copies (draft) Barnes, J
- Nov 30 Filed Notice, and Motion For Production Of Documents—Homer Cummings, William J. Dempsey and Harold R. Schradzke Attys for defts
- Nov 30 Order for production of documents and the filing of certified copies thereof in Clerk's Office (draft) Barnes, J
- Dec 4 Filed Notice and Amended Motion For New Trial And Exhibits Attached To And Forming Part Of Amended Motion For A New Trial—Homer Cummings, William J. Dempsey and Harold R. Schradzke Attys for defts. (Exhibits in folder attached to Amded Mo) Ex A-Ex. B, Ex B-1, Ex B-2, Ex C-1, Ex C-2, Ex C-3, Ex C-4, Ex C-5, Ex C-6, Ex C-7; Ex D-Ex E-1, Ex-E-2
- Dec 7 Filed Notice, Government's Answer To Defendants' Amended Motion For New Trial, and Affidavit of Service—U. S. Atty
- Dec 11 Filed Notice—Homer Cummings, William J. Dempsey and Harold R. Schradzke Attys
- Dec 11 Argmts hrg on defts' amended motion for new trial and concluded and advisement. Cause contd to Dec 15, 1944—2 P. M. for decision Barnes, J
- Dec 15 Defendants amended motion for new trial overruled and denied and order that Clerk forthwith file a certified copy of the orders in the office of the Clerk of the Circuit Court of Appeals & exe (draft) Appeal prayed and allowed Barnes, J
- Dec 15 Filed Memorandum of the Court.
- Dec 19 Filed Notice and Motion To Modify Order of

December 15, 1944 Denying Defendants' Amended Motion For A New Trial—Harold R. Schradzke Atty for Deft Stuart Solomon Brown

Dec 19 Argmts hrd and concluded Mo of deft Stuart Solomon Brown for modification of order entd on Dec 15, 1944—denied Barnes, J

Dec 11 Filed Reply Of Defendants To Government's Answer To Defendants' Amended Motion For New Trial by Homer Cummings; William J. Dempsey and Harold R. Schradzke Attys for defts

Dec 11 Filed Transcript of Record And (2) Volumes of Bill of Exceptions from U.S.C.C.A.

Dec 21 Filed Notice of Appeal—William R. Johnson by his attorneys William J. Dempsey and Homer Cummings

Dec 21 Filed Notice of Appeal—Jack Sommers; James A. Hartigan, William P. Kelly and Stuart Solomon Brown by their attys Homer Cummings and Harold R. Schradzke

Dec 22 Order directing parties to appear Dec 27, 1944 for directions with regard to preparation of record on appeal (draft) Barnes, J

Dec 27 Order fixing 30 days for bill of exceptions and assignment of errors (draft) Barnes, J

Jan 13 Filed Notice and Praceipe For Record—Homer Cummings; William J. Dempsey and Harold R. Schradzke Attys for defts

Jan 12 Filed Certified Copy of Order from U.S.C.C.A.

Jan 17 Filed Assignments of Error—Attys for Defts

Jan 19 Filed Notice and Motion—Attys for defts

Jan 19 Bill of Exceptions in 9 volumes settled approved and authenticated Barnes, J

Jan 19 Filed Bill of Exceptions

Northern District of Illinois } ss
Eastern Division }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made

in accordance with Praeceptum filed in this Court in the cause
entitled

United States of America

vs.

William R. Johnson, et al. D.C. No. 32168

as the same appear from the original records and files
thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand
and affixed the seal of said Court at my office, in the City
of Chicago, in said District, this 19th day of January, A.D.
1945.

(Seal)

Roy H. Johnson
Clerk

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the third day of October, in the year of our Lord, one thousand nine hundred and forty-four, and of our Independence, the one hundred and sixty-ninth.

7500

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WILLIAM R. JOHNSON, DEFENDANT-APPELLANT

7501

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY, AND
STUART SOLOMON BROWN, DEFENDANTS-APPELLANTS

Appeals from the District Court of the United States for the
Northern District of Illinois, Eastern Division

And, to-wit: On the second day of May 1945, there was filed in
the office of the Clerk of this Court, the Opinion of the Court,
which said Opinion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh
Circuit

October Term, 1944, April Session, 1945

No. 7500

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WILLIAM R. JOHNSON, DEFENDANT-APPELLANT

No. 7501

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY, AND
STUART SOLOMON BROWN, DEFENDANTS-APPELLANTS

Appeals from the District Court of the United States for the
Northern District of Illinois, Eastern Division

May 2, 1945

Before SPARKS, MAJOR, and MINTON, Circuit Judges

MAJOR, Circuit Judge. On October 23, 1940, the District Court entered judgment against the defendants upon a jury's verdict which had found them guilty of income-tax evasions for the years 1936 through 1939. The defendants appealed to this court, which reversed the conviction (*United States v. Johnson*, 123 F. 2d 111). The Supreme Court granted certiorari and reversed this court. *United States v. Johnson*, 319 U. S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546).

Before the mandate of the Supreme Court issued, the defendants filed in that court a motion for a stay of mandate until they could take such steps in this court pursuant to Rule 2 (3) of the Criminal Appeals Rules, 18 U. S. C. A., following section 688, as were necessary to have the case remanded to the District Court for the purpose of permitting the defendants to file a motion for a new trial on the ground of newly discovered evidence. Upon a motion of the defendants filed in this court, we remanded the case to the District Court to consider and dispose of any motion filed under Rule 2 (3) of the Criminal Appeals Rules and any motion collateral thereto, and authorized the District Court to assume jurisdiction of the causes for such purposes.

The District Court assumed jurisdiction and permitted the defendants to file their motion for a new trial on the ground of newly discovered evidence, together with supporting affidavits and papers; and the government was given time to respond. The so-called newly discovered evidence was directed to showing that one of the government's chief witnesses, William Goldstein, had testified falsely on the original trial of the defendants. When the various pleadings had been filed, a hearing was had, and the District Court overruled the motion. From that order denying their motion for a new trial on the ground of newly discovered evidence, the defendants appealed to this court, which affirmed the District Court (*United States v. Johnson*, 142 F. 2d 588). The defendants then petitioned the Supreme Court for certiorari.

While their petition for certiorari was pending in the Supreme Court, the defendants asked that court to consider some additional information which they contended proved conclusively that William Goldstein had testified falsely on the original trial. The Supreme Court refused to consider these new facts, because they were no part of the record, but did agree to withhold consideration of the petition for certiorari until the defendants could apply to this court for leave to reopen the proceedings on the motion for a new trial so as to present this new information.

The defendants applied to this court to reopen the proceedings on their former motion for a new trial. On November 16, 1944, this application was granted. We vacated our former order which had affirmed the District Court's denial of the defendants' original motion for a new trial on the ground of newly discovered evidence and again remanded the case to the District Court, this time with directions to consider and dispose of the defendants' amended motion and to certify its ruling back to this court at an early date.

Upon the filing of the certified copy of our order of November 16, 1944, the District Court on its own motion ordered the defendants to file on or before December 4, 1944, their motion and supporting papers as authorized by our order, and further ordered that the United States should respond thereto on or before December 7, 1944. December 11, 1944, was set as the date for the defendants' reply and for oral arguments on the motion. Motion, response and reply were filed, a hearing was had, and on December 15, 1944, the District Court in a memorandum opinion overruled the amended motion for a new trial on the ground of newly discovered evidence and entered judgment accordingly. The defendants' present appeal is from that judgment.

The original motion alleged that William Goldstein testified falsely at the trial in relation to the ownership of ten items of property, referred to as the "Bon Air," the "Curran Farm," the "Green House," the "White House," the "Gas Station," the "Dells property," "9730 Western Avenue property," the "\$10,000 Escrow," the "\$7,500 Escrow," and the "Albany Park Bank Building." The proof offered in support of the original motion had to do with all of these ten pieces of property, while the additional proof offered in connection with the amended motion had to do only with the "Albany Park Bank Building."

That Goldstein's testimony was material and, if false, was highly prejudicial to the defendants, is not in dispute. The falsity of Goldstein's testimony was the essential issue presented and decided by the court below, both on the original and on the amended motion, and the correctness of those decisions is the only issue presented to this court. As stated in the government's brief filed in this court on the original motion:

"It seems obvious therefore that the finding by the District Court that Goldstein did not testify falsely completely and effectively disposed of all purported justification for a new trial, and his order and the appeal therefrom presents to this Court only a question of fact, namely, did Goldstein testify falsely at the trial?"

And again it is stated in the same brief:

"In short, the question presented by the defendants in the court below was: Did Goldstein tell the truth when he testified in the

trial of this case? An examination of the defendants' brief discloses that basically this same question is the sole question presented to this Court. After considering all of the affidavits introduced in support of the defendants' motion for a new trial Judge Barnes found that Goldstein did tell the truth. It is patent that such a finding is a finding of fact."

In discussing the proof bearing upon the issue of falsity, it is important to have in mind the circumstances under which Goldstein testified as a government witness. It appears that the Grand Jury was engaged in an investigation of the income of the defendant Johnson and of one William Skidmore. Goldstein, who was a personal friend as well as the attorney for Skidmore, testified before the Grand Jury. In an effort to protect Skidmore, he gave certain testimony which resulted in his indictment for perjury. He and Skidmore were also indicted as codefendants with Johnson in the instant case. On the day the case was called for trial, the charge against Goldstein and Skidmore was dismissed, and shortly thereafter Goldstein took the witness stand for the government and gave the testimony now alleged to be false. He denied on the witness stand that he had been promised immunity, but stated, "My lawyer has not told me anything about what the deal was." After the perjury indictment was returned, he furnished bond but after the trial in the instant case was released upon his own recognizance. The perjury indictment has not been tried and so far as this record discloses is still pending. Furthermore, it is shown by affidavit that in the summer of 1942 a complaint was filed with the Chicago Bar Association, the designated agent of the Supreme Court of Illinois for the determination of misconduct of attorneys. With reference to this complaint, William J. Dempsey, of counsel for Johnson, in a letter to the Attorney General under date of June 25, 1943, stated:

"The complaint requested that an investigation be made of Goldstein's perjury and that appropriate action be taken. When Mr. Woll (United States District Attorney) learned that such an investigation was to be undertaken, he saw fit to request the Bar Association to defer any investigation of this matter until after the United States Supreme Court had decided the Johnson case. This investigation was deferred again at Mr. Woll's request after the Supreme Court's decision of June 7, 1943."

This statement is not denied either by the United States Attorney or by any official of the Chicago Bar Association.

All of the proof in support of and in opposition to the motion and the amended motion is in the form of affidavits and documents. Much of it, as far as we can ascertain, is immaterial to the issue. In our consideration, we shall attempt to confine our

discussion to that which we think is relevant. We shall first consider the testimony of Goldstein with reference to the "Albany Park Bank Building" for the reason that all of the proof offered in support of the amended motion concerns Goldstein's testimony relative to this property. In our opinion, the government makes an ill advised attempt to escape defendants' contention that Goldstein testified that Johnson was the owner of the properties in question but embraced nothing more than the bare fact that in the purchase of the various properties involved the money for such purchases was received from Johnson. Especially is this true in light of the fact that the cornerstone of the government's case was that Johnson was the owner. Based largely on Goldstein's testimony, the government has succeeded in convincing the jury and court after court that such was the case.

Concerning the Albany Park Bank Building, Goldstein testified: "I was requested by Mr. Johnson to go out there and purchase the (Albany Park Bank) building for him. * * * I purchased that property at the request of Mr. Johnson. * * * Title to that property was taken in the name of Ted W. Goldstein, my son. Subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son. This Albany Park Building property was purchased July 16, 1937."

The court below accurately paraphrased this testimony as follows: "Goldstein testified on the trial that he purchased this property for Johnson and paid for it with currency given him by Johnson; that he took title in the name of his son, Ted Goldstein, and subsequently caused a quit claim deed to be delivered to Johnson."

It is difficult to discern how Goldstein could have any more definitely placed the ownership of this property in Johnson. That the government, squarely relied upon this testimony as proving ownership in Johnson is shown in its brief on reargument before the Supreme Court, wherein it cites Goldstein's testimony alone for the following statement: "Johnson was shown to be the owner of the building" (referring to the Albany Park Bank Building).

At least two of the affidavits refer to Goldstein's perjury generally, as distinguished from that with reference to any particular property, and we shall first consider these affidavits and briefly state the reason they were cast aside by the trial court. Maurice Green, who for many years had been a personal friend of Goldstein, makes two affidavits. In the first he states that he was told by Goldstein, "his testimony regarding purchases of properties for said William R. Johnson was false." Goldstein told the affiant "that he had to so testify to help himself because of charges of contempt, conspiracy and perjury pending against him and to help Skidmore." Affiant discussed with Goldstein the making of an

affidavit telling the truth and Goldstein stated "that he would like to, but that if he did he would certainly be disbarred." In the second affidavit, Green states that when he left his place of employment, i. e., Schwefer's Bakery, Goldstein was waiting for him and the following colloquy took place:

"Madrice, I didn't think that you would go out of your way to hurt me." That I replied, 'I didn't do anything to hurt you. I simply told the truth.' Whereupon Mr. Goldstein said, 'Why did you go out of your way to help Johnson?'

"That I replied, 'If my telling the truth helps Johnson that's all right, and if it hurts you, I'm sorry.'

"That Mr. Goldstein said, 'Skidmore knows about the Affidavits you made.'

"That I replied, 'That's all right with me. If Skidmore sent you to see me it makes no difference. If Skidmore was a man he'd tell the truth himself and tell you to tell the truth.'

"That Mr. Goldstein said, 'I can't do that because if I did I'd certainly be disbarred; and I might as well be dead as disbarred.'

"That I replied to Mr. Goldstein, 'You should have thought of that, Bill, before you gave the kind of testimony you did.'"

An affidavit by Engelbretson verifies the fact that Goldstein was waiting for Green and engaged him in conversation at the time and place related in Green's second affidavit.

Goldstein denies making any of the statements attributed to him by Green. He even denies that he had a conversation with Green. The court casts aside Green's testimony and accepts Goldstein's, largely on the ground that Green is a disbarred lawyer. Green is not shown to have had any connection with the case or any interest in the parties, and no motive is disclosed which would account for a false affidavit by him. We do not think it can be presumed that even a disbarred lawyer will commit perjury. On the other hand, as will be disclosed in this opinion, Goldstein had the most urgent motive to deny the affidavit made by Green, and no reason appears on the face of the record as to why he should be believed in preference to Green.

Edward J. Hess, an attorney in good standing in this court, makes an affidavit that while the appeal from the judgment of conviction was pending in this court, defendant Johnson, accompanied by his brother John E. Johnson, an attorney, met William Goldstein in his office, and states in part as follows:

"He, Johnson, opened the conversation by saying in substance that he was glad to have an opportunity to talk, which he followed by inquiring of Goldstein as to why he testified that 'he bought those properties for me when you know you bought them for Skidmore. Why did you lie?' Goldstein replied in substance that he

was sorry that he did but that he was a victim of circumstances and stated that he preferred not to discuss the matter."

This affidavit is corroborated by defendant's affidavit and by the affidavit of John E. Johnson. Goldstein makes an affidavit denying these affidavits in toto. He states:

"It was purely a frame-up on the part of Mr. Hess to get me in his office so Mr. Johnson and his brother could be there. Mr. Johnson and his brother, John E., threatened me and made attempts to strike me and for a moment it appeared as though they were going to commit murder."

Hess makes another affidavit in which he makes a logical explanation as to how the parties happened to be at his office at the particular time, reaffirms the substance of his previous affidavit, and denies that Goldstein was threatened by the Johnsons.

That the court had difficulty in discounting the testimony of Hess is rather plain. After pointing out that Hess was at one time counsel for some of the co-defendants in the case, the court places a strained construction upon his testimony by stating that it "could as well be taken to mean that he (Goldstein) was sorry he had testified at all, as it could be taken to mean that he was sorry he had lied." We do not think the testimony of Hess is capable of such construction. Even though we lay aside the affidavits of the defendant and his brother, which corroborate Hess, we have a direct issue between Hess, a reputable member of the Bar, and Goldstein. Any kind of logic or reason of which we are aware requires the acceptance of Hess' version as true and that of Goldstein as false.

Title to the Albany Park Bank was conveyed to Ted W. Goldstein (son of William Goldstein) on July 6, 1937. On the next day, Ted W. Goldstein executed a lease on said premises wherein it was recited that the premises had been purchased by him. The rent of \$250.00 per month was paid to William Goldstein by check, which checks were endorsed by William Goldstein, Agent, and also bore the additional endorsement of William Goldstein individually. This property was again leased on September 29, 1941, to the Hines Realty and Construction Company, for a term of five years, expiring September 30, 1946. The lease was signed Theodore Goldstein, by William Goldstein, his duly authorized agent. It provides for a rental of \$250.00 per month for the first nineteen months, and \$300.00 per month thereafter.

The affidavit of one Leo Blockus, employed in the County Treasurer's Office of Cook County, discloses that a receiver was appointed for this property on July 26, 1943, on account of non-payment of taxes. He states that William Goldstein came to his office and offered to pay \$150.00 per month to apply upon such

delinquency, which offer was rejected. William Goldstein subsequently came to the office and offered to pay \$250.00 per month to apply upon such taxes. Blockus inquired of William Goldstein who he was representing, and Goldstein replied: "That is my building, that is my property." Goldstein also advised him that the federal government had a lien against this property and if the County Treasurer did not accept his offer of \$250.00 per month, he (Goldstein) would turn the property over to the government. On July 28, 1943, William Goldstein was again at the office, and Blockus states that Goldstein said four or five times, "The property is mine, you will have to remove the receivers from my property." The court below again relies upon Goldstein's denial of these statements by Blockus and affidavits by Levine and Sampson. A reading of these latter affidavits discloses that the most which can be said of them is that affiants did not hear Goldstein say four or five times, "The property is mine." Furthermore, Levine made a subsequent affidavit in which he stated that Goldstein was talking to Blockus when he arrived at the office and obviously he did not know what was said before his arrival. Also, the other statement by Blockus in which Goldstein asserted "that is my property" is denied by nobody but Goldstein.

A significant circumstance which has been overlooked and which strongly corroborates Blockus is the fact that Goldstein was at the County Treasurer's office attempting to settle the claim for taxes. If, as he testified at the trial, this property belonged to Johnson, why was Goldstein so interested in preventing the property from being sold at a tax sale? Blockus certainly could have had no motive in making a false affidavit as to what Goldstein stated, and we see no basis for a finding other than that his testimony was true and that of Goldstein false.

At the insistence of the County Treasurer, while the property was in receivership, Goldstein took out insurance on the property, the premium on which was over \$300.00. In none of the numerous affidavits filed by Goldstein is any claim made that he was authorized to act for Johnson as agent in the management of this property. He never made any report to Johnson concerning rentals and never tendered to Johnson any of the rents collected. He never made even a single report to Johnson concerning the property, its maintenance, upkeep, management or rental. On the contrary, Marian Giles Sommer makes an affidavit that she was employed by William Goldstein from January 1938 to June 1939 as a stenographer, and that on the first of each month she typed income and disbursement statements relative to this building from long-hand statements given to her by Goldstein, and that at the direction of Goldstein such statements were enclosed in envelopes addressed by her and mailed to William R. Skidmore. Goldstein

denies the Sommer affidavit and, referring to the Albany Park Bank Building, states: "No statements were mailed or given to Mr. Skidmore or Mr. Johnson by me or anyone else."

Goldstein, in an affidavit dated September 8, 1943, states that he is holding the rent money on this building until such time as he is "released from the Internal Revenue Department which served me with a lien to hold all funds and property belonging to William R. Johnson." He does not state when such notice was served and there is nothing in the record to corroborate the fact that it was served. As will be subsequently shown, Goldstein offered the same excuse with reference to his retention of a \$7,500 escrow fund which he testified at the trial he received from Johnson. It has also been suggested that Goldstein was retaining this rent money in trust for Johnson. This is another novel and unbelievable theory. If Goldstein conveyed title to this property to Johnson, as he testified at the trial, he had no more right to collect and retain the rent without authority from Johnson, which he did not have, than he had to collect rent on any other building to which he was a stranger.

In an affidavit made by Goldstein on September 8, 1943, in reference to the Albany Park Bank Building, it is stated:

"The reason that title was not transferred to William R. Johnson was that he requested me to let title remain in my son as he intended to organize a bank sometime in the future and did not want his name connected with it."

In view of the fact that Goldstein was a lawyer and of the careful supervision which must have attended the preparation of his affidavits, this statement is difficult to account for. It is in direct conflict with his trial testimony that he "caused a quit claim deed to be delivered to Johnson." In other words, at the trial he testified that title was transferred to Johnson and now he states a reason why it was not transferred. On first impression, it might appear that in his affidavit he was referring to record title, but Goldstein must know that record title is not a matter of transfer, and that its perfection is optional with the person who owns the actual title. If Goldstein transferred title to Johnson, as he testified at the trial, it was then entirely up to Johnson as to whether his title should become a matter of record.

This brings us to a consideration of the proof relative to the amended motion for new trial. Defendants offered in support of their amended motion the individual income tax returns of Theodore Goldstein, son of William Goldstein, for the years 1937-1943, inclusive, affidavits by Edward H. Wait and Frank Sampson, and a lease dated January 3, 1944 between Theodore Goldstein and Hines Realty and Construction Company, together with a

rider attached thereto. The government filed counter-affidavits by Theodore Goldstein, William Goldstein, Stanley A. Wodrick, and Edward H. Schulz. The income tax returns filed by Theodore Goldstein are signed and sworn to by him in his individual capacity, in which he charges himself with the income from the Albany Park Bank Building and takes credit for the loss. The return for the year 1940 is typical. It states the year the building was purchased, the price, the depreciation theretofore taken, and the remaining life of the building. It shows a rental income of \$900.00, claims a deduction of \$1,531.08 on account of real estate tax, takes a depreciation of \$1,000 for the taxable year, and shows a net loss for the year of \$1,631.08. This loss is deducted from a \$2,600 salary income, leaving the taxpayer with a net income of \$968.92. That William Goldstein was responsible for the making of such returns by his son Theodore, there can be no question. He dealt with the Bureau of Internal Revenue as the agent of Theodore, he took the returns to Theodore and procured his signature thereto, and any tax shown to be due was paid by him. No point is made, and we think none could be logically made, but that William is chargeable with the contents of the returns in the same manner and to the same extent as though they had been made by him.

It is the contention of the defendants, with which we agree, that the representation contained in these returns as to the ownership of this property is inconsistent with Goldstein's testimony at the trial that he purchased this property for and delivered a quit claim deed to Johnson. The trial court seems to agree with this theory in part. It states:

"Considering the mere filing of the income tax returns aforesaid and disregarding the circumstances of their filing * * * it could probably reasonably be argued that the filing by Theodore W. Goldstein of the returns could be held to be some evidence of the fact that during the years in question he had some interest in the property other than as the holder of the bare legal title."

The court then proceeds at great length to analyze the affidavits submitted by the government relative to the circumstances under which the returns were filed and finds that due to such circumstances they are without value in support of defendants' motion. It would unduly prolong our discussion to recite in detail these affidavits. We think we can show the government's position by a brief statement. It appears that affiant Schulz of the Bureau of Internal Revenue in Chicago received information that the income from the Albany Park Bank Building had not been reported and that rents were supposedly being paid to William Goldstein, who claimed to be agent for Theodore Goldstein. Affiant Wodrick, a deputy collector, was assigned to investigate, and had an inter-

view with William Goldstein. Wodrick's affidavit was made after such interview, in question and answer form, in the Bureau of Internal Revenue, long prior to the filing of defendants' amended motion. He testified that Goldstein, in response to a question as to who owned the property, stated, "I do not know the owner." Goldstein also stated with reference to the ownership of the property, "that he received money from persons unknown for the purchase of that building. He also stated that he didn't know whether it was Skidmore or Johnson's money."

Wodrick insisted that Theodore Goldstein must file returns inasmuch as the record title was in his name. To this, William Goldstein objected because Theodore was not the actual owner. A few days later, William Goldstein agreed to the preparation of the returns and stated, "that he would like to have the matter closed as soon as possible." Wodrick prepared the returns which were subsequently made by Theodore. Wodrick, subsequent to the filing of the amended motion, made an affidavit in which he stated that he understood his question and answer statement was to be used in the motion for new trial by Johnson and that he wished to modify such statement.¹ In this affidavit he states that what he intended to say was, "Goldstein stated to me that he did not know whose money it was that he had received for the purchase of that building. At no time did I ask Mr. Goldstein who gave him the money for the purchase of that building and at no time did he say that unknown persons gave him the money to purchase the building."

Affiant Schulz states that William Goldstein on numerous occasions told him that Theodore Goldstein was the title owner of record but was not the actual owner of this property. Affiant informed William Goldstein that Theodore would be required to make the returns even though he was not the actual owner. Affiant also stated that William Goldstein refused to sign an affidavit containing the statement that his son Theodore was "the owner." The affidavit of William Goldstein also states that he was advised by government officials that the returns must be filed by Theodore. Finally he agreed so to do, took the returns which had been prepared by Wodrick, had Theodore sign them, return them to Wodrick's office and paid the tax shown to be owing.

Theodore Goldstein states that he is not the actual owner, does not have and never did have any beneficial or financial interest in the building. As a reason for the filing of the returns, he states that he was told by William Goldstein that the Internal Revenue Department was insisting that he do so, that the situation had been

¹ It would be interesting to know under what circumstances Wodrick made this affidavit. We think it is entitled to little, if any, weight.

explained by William Goldstein to the Revenue Department, but nevertheless the Department required the filing of such returns.

These affidavits as to the "circumstances" are more illuminating for what they omit than for what they contain. For instance, this is the first time that Theodore Goldstein has appeared as a witness in this case, although the defendants attempted without success to procure his attendance at the trial. William Goldstein testified at the trial, "Subsequently there was a quit claim deed delivered to William R. Johnson by my son." Theodore, evidently the only person in a position to corroborate William Goldstein on this important testimony, when presented with an opportunity to so do, either refuses or fails. Is it possible that this was a mere inadvertence or has the government abandoned its effort to defend this portion of William Goldstein's testimony? That the latter appears more reasonable is also shown from an affidavit of William Goldstein. After reaffirming his testimony given at the trial, his affidavit states:

"And, in particular restate that the amount expended for the purchase of the Albany Park Bank Building property was \$59,887.05 and that I got that money from Mr. Johnson in the form of currency."

No place, however, does he restate that his son Theodore delivered to Johnson a quit claim deed to the property. Another pertinent observation in this connection is that it is no longer claimed that Goldstein holds this property in trust for Johnson.

Another glaring omission from these affidavits (other than the first affidavit of Wodrick) is their failure to make any reference to any inquiry by the Revenue agents or any statement by Goldstein as to who owned this property. Is it conceivable that the Revenue agents in their attempt to ascertain who was chargeable with the income from this building made no inquiry of Goldstein as to who was the owner? To think so is to reflect upon their intelligence. We have no doubt but that Wodrick told the truth when he stated that he attempted to do so and that Goldstein denied knowledge as to ownership and knowledge as to who had furnished the money for its purchase. Furthermore, is there any logical basis for the thought that if Goldstein be the honest, truthful man the government and lower court would have us believe that he would have remained silent upon such a vital matter? Would not he have proclaimed to the Revenue agents, as he did at the trial, "I bought this property for Johnson and title was conveyed to him"? But whether honest or not, would he not have divulged the ownership of Johnson rather than persuade his son to commit perjury? If he was holding this property in trust for Johnson, as was formerly claimed, he was holding the income in trust. Why did he not offer to turn the income over to the Revenue

Department to apply on a lien which the government had against Johnson?

The Revenue officials no doubt were familiar with the alleged false testimony of Goldstein, his leasing of the property, collection of the rents and his many other activities wholly inconsistent with his trial testimony, and felt that it was time for Goldstein either to disgorge himself of this income or pay a tax thereon. Goldstein was willing to claim he was holding it in trust for Johnson as long as it did not interfere with his rights to collect and convert, but when confronted with the latter situation he, a lawyer of many years' experience, decided to repudiate the contention that the property was Johnson's and claim it for himself.

We think the "circumstances" destroy themselves, but more than that, the court, in accepting them as destroying the evidentiary value of the returns, has overlooked the essential point in the matter. After all, they are either true or false. Neither the court in its opinion nor the government in its brief makes any contention one way or the other; in fact, the point is not mentioned. If the returns are true, what difference does it make concerning the circumstances under which they were filed? If they are true, their probative value is no different than if they had been filed without any interference on the part of the Revenue agents. Certainly it cannot be plausibly contended that the activities of the Revenue agents were such that William Goldstein was deprived of his free will in the matter and that he knowingly procured from his son Theodore returns which were false. If the lower court properly disregarded them, it must have been because of their falsity, but even so, it would be of little benefit to the government. If such be the case, it shows the ease with which Goldstein can adjust himself under oath to serve his own purpose, even though it involves the commission of perjury or subornation thereof. If Goldstein was on trial for perjury, we think a court would admit the returns in evidence and that a jury would accept them at their face value, notwithstanding the "circumstances" under which they were obtained.

The affidavit of Frank Sampson has to do with the leasing of the Albany Park Bank Building. He states, concerning the lease which expired on September 30, 1946, and which we have heretofore mentioned, that the rent during all the time was paid to William Goldstein as agent for Theodore Goldstein, and that generally William Goldstein came to the building each month to collect it; further, that in 1943 he informed Goldstein that he would like to have an option to renew the lease for ten years. In reply, Goldstein stated an option was not necessary, "that I could stay in possession of the premises as long as I wished." Upon affiant's insistence on a written option, Goldstein stated "that I

would have to wait until the court ruled in the 'Johnson case' which was then pending before Judge Barnes. I then asked Goldstein if Johnson had anything to do with the property. Goldstein replied 'Johnson never had any interest in the property and has nothing whatever to do with it.' Finally Goldstein suggested that affiant prepare a lease and that he would take it to Hot Springs, Arkansas, where he was going to meet his son Theodore who was in the Service. This was done and the lease was signed by Theodore. The lease expires September 30, 1956. It contains all the incidents usually found in a lease of which the lessor is the owner of the property.

Goldstein in his affidavit denies all the statements attributed to him by Sampson concerning Johnson's interest in the property. The trial court points out the fact of Goldstein's denial without comment, and as to the lease quotes from its former opinion concerning the previous lease, in which it stated: "This is not inconsistent with Goldstein's testimony on the trial." We suppose, according to this reasoning, if Goldstein should lease this property from now until eternity and retain the rents as long as he lives, it would not be inconsistent with his testimony that he purchased this property for and conveyed the title to Johnson. Further, it would not be inconsistent with the government's theory that Johnson was the owner. We do not agree with such reasoning. We think this circumstance alone, unexplained as it is, comes close to establishing the falsity of Goldstein's trial testimony.

Thus we have the testimony of Green and Hess (not to mention the defendant Johnson and his brother John Johnson) of admissions made by Goldstein that he testified falsely at the trial. We have the testimony of Blockus that Goldstein, referring to the Albany Park Bank Building, stated "that is my building, that is my property. The property is mine." We have the testimony of Sommer that Goldstein sent statements of the income and expenses on the building to Skidmore and not to Johnson; the testimony of Wodrick, a Revenue agent, that Goldstein stated, "I do not know the owner, that he received the money from persons unknown for the purchase of the building, that he didn't know whether it was Skidmore's or Johnson's money"; and the testimony of Sampson that Goldstein stated, "Johnson never had any interest in the property and has nothing whatever to do with it." In addition, the income tax returns and the long-term leasing by Goldstein are utterly inconsistent with his trial testimony. Furthermore, this direct testimony finds strong corroboration in the numerous circumstances which we have related. More than that, there must be considered not only the motive which prompted Goldstein's testimony at the trial but his present motive in making affidavits in an obvious effort to serve his own interest. Taking

all of these things together, we have a strong and abiding conviction that Goldstein's testimony concerning the Albany Park Bank Building was false.

We shall now refer to the escrow items, one in the amount of \$10,000 and the other in the amount of \$7,500. Goldstein testified at the trial that he received the \$10,000 from Johnson for the purchase of certain property and that he placed it in escrow with the Chicago Title and Trust Company. This was denied by Johnson. Goldstein also testified at the trial that he received the \$7,500 from Johnson in the form of currency and deposited it in the State Bank of Evanston at Johnson's request. This was also denied by Johnson. Shortly after the trial, Goldstein made a demand on the Chicago Title and Trust Company for the return to him of the \$10,000 escrow deposit. J. Lawrence Holleran, an attorney for the trustee, testified by deposition that Goldstein at the time he was attempting to obtain the withdrawal of the escrow stated that he was representing himself and no other person and "it was my money that I put up and I want it back." He then agreed to pay a reasonable attorney fee, in order to avoid the filing of a suit. He offered \$100.00 for release of the deposit. Again Goldstein said to affiant over the telephone, "All I am interested in is my money. It is my money I put up and you can't deliver under the contract and I want my money back."

Guild, the trustee, in a deposition also states: "Mr. Goldstein said he wanted the return of his money that was on deposit in escrow." Affiant asked Goldstein who was the owner of the money and he replied "that he was the owner of the money." These statements of Guild and Holleran are not denied by Goldstein, although he does state the money was given him by Johnson and that it is Johnson's money. Frank Fowler testified that Goldstein told him "that he had \$7,500 in escrow in a bank in Evanston and \$10,000 in escrow in the Chicago Title and Trust Company. That Mr. Goldstein later told me he withdrew the \$7,500." It appears that some law suit or claim was pending against the Bon Air Country Club and Goldstein was unable to obtain the deposit until that suit or claim was settled.

The \$7,500 deposit was withdrawn from the Evanston Bank on October 30, 1944, shortly after the conclusion of the trial, and a receipt given by Goldstein in his individual capacity. He has never offered to return it to Johnson, from whom he testified at the trial it was received. In fact, he still retains it, as far as the record discloses. In an affidavit executed September 10, 1943, Goldstein states:

"The \$7,500 returned to me by the State Bank and Trust Company was not returned to Mr. Johnson or tendered to him because sometime in the early part of 1940 I was served with a notice by

the Internal Revenue Collector's Office to withhold all monies and properties which I had in my possession for Mr. William R. Johnson subject to their orders."

That statement of Goldstein's is uncorroborated. If there is any method known to the law by which one man's money can be held by another under such pretext, we do not know about it. On its face it sounds unreasonable and unbelievable. The record shows that Johnson owes money to the government and, according to Goldstein, he has \$7,500 which belongs to Johnson in his possession with the government's knowledge and the government does nothing about it.

Notwithstanding Goldstein's affidavit that the money for these escrow deposits was given to him by Johnson and that it was Johnson's money, we have two disinterested witnesses who swear as to the \$10,000 deposit that Goldstein said "that he was the owner of the money." Again, as to these deposits, the question naturally arises as to why Goldstein had any business obtaining their withdrawal if they were the property of Johnson. It is not even claimed by Goldstein that he had any authority from Johnson to do so. These facts and circumstances persuasively point to the falsity of Goldstein's trial testimony that these deposits were the property of Johnson.

The Bon Air Country Club was perhaps the most important of the properties involved for the reason that not only the purchase price but the large expenditures which were made upon it were charged in toto to Johnson. As already stated, it has been the government's contention and we assume it still is, that Johnson was the sole owner of this property; otherwise, all of the expenditures could not properly have been charged to him. The government in its brief summarizes Goldstein's testimony with reference to this property thus:

"Briefly stated, this testimony is to the effect that Goldstein, at the request of Johnson, purchased this property for Johnson with \$75,000 given him by Johnson and delivered a deed to Johnson."

It might be added that title to this property was taken in the name of Ted Goldstein and a quit claim deed subsequently delivered to Johnson.

Johnson denied that Goldstein purchased this property for him and denied that he gave Goldstein the money so to do. He admitted that title was in his name by reason of a quit claim deed from Ted Goldstein but testified that he had conveyed a one-half interest to Skidmore; therefore, Johnson, according to his testimony, was the owner of a one-half interest in this property and Skidmore was the owner of the other one-half interest. Here again, the government contends that the only material testimony of Gold-

stein is that he received the \$75,000 from Johnson for the purchase of this property. We think there is merit in this contention, even though inconsistent with the strong reliance which the government has heretofore placed on Goldstein's testimony as showing ownership by Johnson.

There is proof, however, that Goldstein testified falsely regarding this property, even though his trial testimony be limited in the manner urged by the government. In an affidavit by Frank Fowler, a retired business man, it was stated that William Goldstein told him "that he had bought the property known as the Bon Air Country Club for his client, Mr. William Skidmore * * *. That Mr. Skidmore had given him (Goldstein) the money to buy the said Bon Air Country Club property. That the said Mr. William Goldstein at all times referred to Mr. William R. Skidmore as 'the boss'." It will be noted that this statement is in direct conflict with Goldstein's trial testimony that he obtained the money from Johnson. Goldstein denies the statements attributed to him by Fowler. Again the trial court rejects Fowler's testimony and accepts that of Goldstein, largely on the basis of Goldstein's statement that Fowler was a discharged former employee of his and was biased against him. There is nothing in the record, however, which impugns Fowler's reputation in any manner. He is not shown to have any connection with any of the parties or any motive for making a false affidavit.

In 1942, Johnson filed a partition suit in Lake County, Illinois, covering the Bon Air Country Club (and other property) in an attempt to force a disclosure of Skidmore's interest. Maurice Green testifies that he had a conversation with Goldstein and Skidmore in the latter's office in March 1942, in which Goldstein stated, "that he (Skidmore) could not file an answer declaring his interest in the properties because if he did that such an answer in the partition suit would definitely establish his testimony (Goldstein's) in the trial of William R. Johnson as completely false." He further stated that Mr. Skidmore therefore could not file an answer, but would have to take his chances on working the matter of his interest in the property out with Johnson after the whole thing was over." Affiant is the same person heretofore referred to as a disbarred lawyer. In addition to this, the court finds that this statement is unreasonable and unworthy of belief. The record discloses, however, without dispute, that Johnson filed the partition suit making Skidmore a party and that the latter refused to answer. It also discloses, without dispute, as will be herein-after shown by the affidavits of March and Peacock, that Johnson did convey to Skidmore a one-half interest in this property and that such conveyance was made under the direction of Goldstein.

Therefore, the statement which Green attributes to Goldstein in this affidavit is consistent with the undisputed facts.

Walter Henrichsen testifies that he was employed at the Bon Air Country Club and that he heard Skidmore say "that he didn't want anyone to know that he (Skidmore) had any interest in the Bon Air Country Club"; that affiant in the early part of March 1941 was served with a summons involving the Bon Air Country Club property (and other property) that he spoke to Mr. Skidmore about the summons; that Mr. Skidmore stated to this affiant that he (Skidmore) would not contest the suit involving the property at this time; that he (Skidmore) had in his possession unrecorded quit claim deeds to the Bon Air property (and other property) * * *: that if any more papers were served on this affiant pertaining to Bon Air to take all such papers to Mr. Goldstein; that affiant on several occasions was told "to take the bills to the creditors and instruct the said creditors that Mr. Skidmore had nothing to do with the Bon Air Country Club"; and that on several occasions he was told by William Goldstein "that no mail was to be received at the Bon Air Country Club addressed to William R. Skidmore."

This affidavit of Henrichsen is not so important as the means disclosed by the court for its elimination. The government filed an affidavit by Wilbert F. Crowley, an assistant states attorney of Cook County, in which he states that Henrichsen testified as a witness for the State in a kidnapping case and described in detail his participation in such crime. It is obvious that Crowley's affidavit was immaterial and could not properly be used for the purpose of discrediting Henrichsen. However, it was used for that purpose.

Joseph Shaffron, engaged in the Rumber business, makes an affidavit that he visited Skidmore about September 1, 1940; and that Skidmore in the presence of Goldstein stated, "Joe, they are trying to put one-half ownership of the Bon Air on me. You know, Joe, that I own it, but if anyone asks you, tell them that I have no interest in it."

To us the most remarkable disclosure in this record is that contained in the affidavits of Beatrice Marsh and William R. Peacock. The former was a stenographer employed by William Goldstein during the years 1938 to 1942. In her affidavit, dated July 1, 1943, she states that on April 21, 1939, at the request of William Goldstein, she prepared deeds to certain parcels of land, including Bon Air, in which Ted W. Goldstein was named as grantor and William R. Johnson as grantee, and that on July 20, 1939, at the request of William Goldstein, she prepared deeds for certain parcels of land, including Bon Air, conveying an undivided one-half interest in all of said parcels of land. These deeds were

signed by William R. Johnson as grantor and named William R. Skidmore as grantee. Peacock, a lawyer, during the trial of this case was employed by Goldstein and served as successor-trustee at the request of Goldstein to the property known as the Bon Air Country Club. His affidavit is dated July 20, 1943, at which time he was serving as a Major in the United States Army. He states in his affidavit that during the summer of 1939, the exact date of which he is not certain, William Goldstein asked him to acknowledge several deeds signed by William R. Johnson, which deeds conveyed an undivided one-half interest in certain parcels of real estate to William R. Skidmore, who was a client of William Goldstein. He further stated that he did not know the legal description of the parcels conveyed but he did know that one of such properties was known as Bon Air Country Club; further, that as a notary public he acknowledged such deeds and returned them to William Goldstein.

If these two witnesses have spoken the truth, which there is no reason to doubt, they furnish convincing proof of the truth of Johnson's trial testimony that he was the owner of only one-half interest in Bon Air, as well as some of the other properties involved. If true, they just as conclusively shatter the foundation upon which this prosecution has been constructed. They furnish strong circumstantial proof of the falsity of Goldstein's testimony and demolish the implication which was drawn therefrom and used by the government to such good advantage.

Moreover, these affidavits bring to light Goldstein's carefully designed plan to preserve as a secret the fact that his friend Skidmore was the owner of one-half interest in the property. They demonstrate, if any further demonstration is necessary, his motive in giving false testimony at the trial, as well as the motive back of his testimony which resulted in his own indictment for perjury. They disclose a willingness on his part to aid in the conviction of Johnson and his co-defendants upon a premise known by him to be false. This must be so, as he had delivered into his possession deeds prepared at his direction by which Skidmore became the owner of a one-half interest in Bon Air and other property. In our considered judgment, Goldstein testified falsely at the trial and has been so thoroughly discredited that his affidavits offered in opposition to the motion for a new trial carry little, if any, weight. The proof therein contained affords no substantial support for a finding that he testified truthfully at the trial.

We see no reason to prolong this opinion by a discussion of other proof and circumstances relied upon by defendants to show that Goldstein testified falsely concerning other material matters, and particularly as to other properties which he testified he purchased with money furnished by Johnson. It is sufficient to state that

such proof is of a nature similar to that which we have discussed. We have purposely confined our discussion to his testimony concerning matters vital to the government's case.

As our opinion discloses, we have reached the conclusion that Goldstein testified falsely at the trial. The conviction which we entertain in this respect is without reservation. In this situation, what is our duty as a reviewing court? Must we lay aside such conviction in deference to a contrary finding by the trial court? To do so is to acknowledge our impotency to correct what otherwise may amount to a gross miscarriage of justice. We are of the view that the fundamental right to a fair trial is not dependent upon a thread of such tenuous nature.

In our former opinion (142 F. 2d 588), we sustained the finding of the trial court on the theory that we had the right of review only for the purpose of determining whether there had been an abuse of discretion. In so doing we emphasized that the trial court had before it "the record made upon the trial and the demeanor of Goldstein and others upon the stand"; also that "several of those who made affidavits for the defendants in support of their motion were witnesses at the trial. So it was not merely a printed record that the District Court had before it." We then said: "We cannot say, in the light of the whole record before the District Court, that the so-called newly discovered evidence inevitably leads to the conclusion that Goldstein had testified falsely."

True, there were affidavits submitted in support of the original motion made by persons who were witnesses at the trial. Of such affidavits, however, we think it may be said that they were immaterial to the issue before the court and were subject to a motion to strike if such motion had been made. In our present consideration of the case, we have considered no evidence, whether by affidavit or in documentary form, which was offered at the trial (except, of course, the affidavits of the defendant Johnson and the witness Goldstein). Therefore, the affidavits which we have considered were made by persons whom the trial court neither saw nor heard as witnesses. All the proof which we have considered (except the affidavits of Marsh and Peacock) had to do with matters and events subsequent to the trial, and some a long-time subsequent. More than that, none of the persons whose affidavits we have considered (except Peacock) were subpoenaed as witnesses at the trial.

Under such circumstances, it would appear that we are in as good a position to evaluate the testimony as the trial court. This was the view expressed in *Hamilton v. United States*, 140 F. 2d 679, where a similar question was considered. There, it was held that there had been an abuse of discretion on the part of the trial court

because of the improper construction which that court placed upon affidavits submitted in support of a motion for new trial. The court (page 681) stated:

"An affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused. Ambiguities should not be resolved in favor of the prosecution without inquiry of the proposed witness. * * * We think it was an abuse of discretion when the trial court indulged in a hypothetical interpretation of the statement of newly discovered evidence in order to make it consistent with the testimony it was intended to rebut."

It has been held in civil cases that where proof is submitted by deposition, affidavits and documents, the reviewing court is in as good a position as the District Court to make deductions and conclusions. *Himmel Bros. Co. v. Serrick*, 122 F. 2d 740; *Nashua Mfg. Co. v. Berenzweig*, 39 F. 2d 896. We see no reason why this rule is not even more appropriate where it is asserted the rights of a defendant in a criminal case have been prejudiced. The trial judge, of course, saw and heard Goldstein at the trial. Assuming that his appearance at the time was favorable, it is still difficult to see how the court could properly take that circumstance into consideration in weighing his affidavits in the instant matter against affidavits made by persons whom the court had not seen or heard. If such a yardstick was to be used, we think the court should have called the witnesses who had made affidavits and required their interrogation in open court, so that their testimony could be properly evaluated in connection with that of Goldstein.

It is not necessary, however, that we retract our previous holding regarding the "abuse of discretion" rule. We now think that we accorded it a more strict application than the circumstances justified. Moreover, further proof was submitted in connection with the amended motion which, as we have attempted to show, furnishes strong additional support for the contention that Goldstein's testimony was false.

It is our conclusion that the proof offered in support of the original and amended motion, with the attending circumstances, unerringly points to the fact that Goldstein's trial testimony was false. The finding of the trial court, to the contrary was, in our judgment, an abuse of discretion. We reach this conclusion with diffidence, and in so doing attribute to the District Judge a motive as laudable and a purpose as honest as we claim for ourselves.

The lower court held applicable the rule announced in *Berry v. Georgia*, 10 Ga. 511, as to the requirements on a motion for new trial because of newly discovered evidence. In our former opinion, we quoted the rule therein announced, approved its application and cited numerous cases wherein it has been approved. Repetition of such rule and authorities is here unnecessary. The rule of the

Berry case was applied on the premise that there had been no showing of the falsity of Goldstein's testimony and therefore the instant motion should be considered as an ordinary motion for new trial. ~~It was upon our affirmance of the lower court's finding that Goldstein had not testified falsely that we approved the application of the rule.~~

We now have disapproved of the finding of the lower court relative to the falsity of Goldstein's testimony. It necessarily follows, so we think, that the rule of the Berry case becomes inoperative. It therefore becomes unnecessary to discuss the rule of that case or the reasons assigned as to why defendants have failed to meet its requirements.

We think that logic and sound reasoning require the application of a different rule. This must be so for the reason that on an ordinary motion for new trial the court is concerned with the probable effect which the newly discovered evidence might have upon another trial. In contrast, where the motion is based on false swearing, the concern of the court must be as to the probable effect produced on the trial already had. In the former case, the court looks to the future, in the latter case to the past, and the sole question is whether the defendant's right to a fair and impartial trial has been prejudiced by reason of the false testimony.

There are cases which support the general view which we have expressed. *Pettine v. Territory of New Mexico*, 201 Fed. 489; *Martin v. United States*, 17 F. 2d 973; *Larrison v. United States*, 24 F. 2d 82, 87; *State v. Mounkes* (Supreme Court of Kansas), 138 Pac. 410. The rule is aptly stated by this court in the *Larrison* case (page 87) that a new trial should be granted when,

"(a) The court is reasonably well satisfied that the testimony given by a material witness is false;

"(b) That without it the jury might have reached a different conclusion.

"(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

We have already concluded that Goldstein's testimony was false. We think we need not labor the point that the jury might have reached a different conclusion without it. In fact, it was upon his testimony that the government placed much reliance that Johnson was the owner of certain properties, by reason of which he was charged with all of the purchase price as well as with the enormous expenditures made thereon. As was said in *Martin v. United States*, *supra*, page 976:

"There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury, and, notwithstanding the perjured testimony was contradicted at the trial, a new light is thrown on it by the admission that it was false; so

that on a new trial there would be a strong circumstance in favor of the losing party that did not exist and therefore could not have been shown, at the time of the original trial."

Again, as stated in the Pettine case, *supra*, page 494, where the court considered a similar question:

"Is it clear beyond doubt that this testimony did not turn the scales against him or remove from the mind of some juror a reasonable doubt of his guilt? Can it be truthfully said that it was not a gross abuse of its discretion for the trial court to refuse to grant a new trial here and to refuse to exclude this false testimony from the minds of the triers of this fateful issue? * * *?"

Other cases which have held that a reversal was required on account of error which might have affected the result are *Miller v. Oklahoma*, 149 Fed. 330, 339; *Little v. United States*, 73 F. 2d 861, 866; *United States v. Dressler*, 112 F. 2d 972.

As to requirement (c) of the Larrison case, we think it may be taken for granted that the defendant Johnson knew of the falsity of Goldstein's testimony at the time it was given and likewise that he was unable to meet it. Certainly he was unable to meet it with the proof now submitted in support of a motion for new trial for the reason, as already shown, that all of such proof, with certain minor exceptions, was not in existence at the time of the trial. It relates to matters which have occurred since that time. While it may or may not be pertinent, we disagree with the lower court in its conclusion that there has been an unreasonable delay in the presentation of the newly discovered evidence. True, it has now been more than four years since the judgment was entered against the defendants, but a mere statement of the time is misleading unless considered in connection with what has transpired in the meantime. Without attempting to fix the date when Johnson and his counsel obtained each bit of newly discovered evidence, we think it can be said, with certain minor exceptions, that the record discloses its discovery subsequent to September 15, 1941, the date of the entry of this court's judgment on the original appeal. This court held that the indictment was void and we suppose that was the law of the case until June 7, 1943, when our judgment was reversed by the Supreme Court. Certainly during that time there was no occasion for a motion for remand because of newly discovered evidence.

The record discloses that during the time the case was pending before the Supreme Court, this newly discovered evidence, or at least a portion of it, was submitted to the Department of Justice with a request for an investigation of the charge that Goldstein had testified falsely. The Supreme Court's mandate provided that it was without prejudice to defendants' right to present to this court a motion to remand on account of newly discovered evidence. We can say of our own knowledge that since that time

defendants have acted promptly and without any unreasonable delay. Furthermore, the proof offered in support of the amended motion was discovered during the pendency before the Supreme Court of defendants' application for certiorari from our former decision affirming the District Court's denial of the original motion for a new trial. While the situation is unusual, perhaps extraordinary, we are of the view that there has been no delay so unreasonable as to preclude consideration of the proof which defendants have presented.

The court below also concluded that all but a few of the items of newly discovered evidence were merely cumulative of other like items presented at the trial. Again, we doubt if this conclusion is material in the instant situation. As this court said in the *Larrison* case, *supra* (page 87):

"We agree with the court in *Martin v. U. S.* (C. C. A.), 17 F. 2d 976, and hold that courts should not necessarily deny motions for new trials when the perjured testimony is merely cumulative. The fact that the testimony is cumulative only, should no doubt be considered, but it is not conclusive on the motion for new trial."

Furthermore, we do not think that most of the items, in fact, none of those which we have discussed and relied upon in this opinion, are cumulative. It appears that the lower court considered as cumulative any proof which showed Goldstein's trial testimony to be false, on the theory that such proof at the same time corroborated or was cumulative to that of the defendant Johnson. If such reasoning is sound, we think it is not, it would preclude the allowance of a motion for new trial based on false testimony by a government witness in every case where such testimony was disputed by the defendant at the trial. In *People v. Royals*, 356 Ill. 628, the court, in discussing the rule as to cumulative evidence, on page 639 stated:

"The rule stated above does not bar the granting of a new trial on the ground of newly discovered evidence if the new evidence relates to a material point contested on the trial, otherwise there would scarcely ever be a new trial granted on such ground."

It is our conclusion that the defendants have brought themselves within the rule of *Larrison* and kindred cases and that the prejudicial effect of Goldstein's false testimony can only be remedied by a new trial. The order appealed from is therefore reversed and the cause remanded, with directions that the motion for new trial be allowed.

MINTON, Circuit Judge, Dissenting.

I am unable to agree with the majority opinion because I think it clearly invades the province of the trial court. We do not sit

here to pass upon the facts upon this motion. That is for the trial court. We sit only to review the trial court's action, and to determine whether or not the trial court abused its discretion.

In reaching this determination, we do not dispute with the trial court on the conclusions it reached on the facts. We determine only whether the trial court reached a decision it might reasonably have reached upon the facts before it; not whether we, on those facts, might have reached a different conclusion. If the trial court reached a conclusion while it might reasonably have reached, and excluded nothing from its consideration which it ought to have considered, it has not abused its discretion. That is the only question we have to determine. I think a fair review of the trial court's decision requires us to conclude that there was a basis in reason for its decision and that there was no abuse of its discretion.

The trial judge tried the case and heard the testimony of the witnesses whose veracity is now in question. He found against them after a most careful consideration of each contention of the appellants. He had before him not only the witnesses at the trial, but all of the record. He did not exclude anything. He submitted his views in a written opinion covering some sixty pages, far too long to be incorporated here. We upheld his decision and judgment on the original motion for a new trial on the ground of newly discovered evidence (142 F. 2d 588). The trial court held that the showing made on the amendment to the motion, which is now before us, contained nothing to warrant it in holding differently. With this view I am in accord.

The chief controversy revolves around the ownership of a property located at 3424 Lawrence Avenue, Chicago, known as the Albany Park Building. Failure to report the income from this property was one of the charges against Johnson on the original trial. At that trial, William Goldstein testified in part as follows: "I was requested by Mr. Johnson to go out there and purchase the building for him. * * * I purchased that property at the request of Mr. Johnson. * * * I can state that the amount expended for the purchase of that property was \$59,887.05. I got that from Mr. Johnson in the form of currency. Title to that property was taken in the name of Ted W. Goldstein, my son. Subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son. This Albany Park Building property was purchased July 16, 1937."

The defendant Johnson, at the trial and by affidavit filed in the original motion for a new trial, denied that he had ever had any such transaction with Goldstein.

The jury, however, on the original trial resolved this issue against the defendant Johnson, and the Supreme Court, in a very sharp opinion somewhat critical of this court, stated most emphatically that the evidence was sufficient to sustain the verdict as to all defendants. Thus, the sufficiency of the evidence is not open to us for consideration. Considering the evidence most favorable to the Government, upon the record as originally presented to the Supreme Court, the jury was justified in finding from the testimony of William Goldstein that he had purchased the Albany Park Building at the request of Johnson, with money furnished him by Johnson, and that the title had been taken in the name of William Goldstein's son, Theodore Goldstein, who afterwards delivered to Johnson a quit claim deed for the property. Title was taken in Theodore Goldstein's name to conceal the fact that Johnson, who intended to open a bank in the building, was the owner. It should be noted that Goldstein testified only to facts of the transaction. He did not attempt to testify categorically that Johnson owned that property. Any such statement would probably have been objectionable as invading the province of the jury. In any event, the jury would have been warranted in finding from Goldstein's testimony that Johnson was the owner of the Albany Park Building.

The new evidence submitted by the defendants on their amended motion for a new trial consists of the photostatic copies of the individual income tax returns of Theodore Goldstein for the years 1937, 1938, 1939, 1940, 1941, 1942, and 1943, and the affidavits of Edward Wait and Frank Sampson. The affidavit of Edward Wait is wholly immaterial. The income tax returns show that Theodore Goldstein returned the rentals collected from the Albany Park Building each year as his individual income and in each return claimed depreciation on the building. The affidavit of Frank Sampson shows that on January 3, 1944, Theodore Goldstein gave an option for a ten year lease on the property to the Hines Realty and Construction Company, of which Sampson was the president. This transaction was handled by William Goldstein, since his son was then in military service.

The defendants contend that these facts, because they evidence dominion over this property by Theodore Goldstein as though he were the real owner, are conclusive proof that William Goldstein testified falsely on the original trial, and that Theodore Goldstein is the real owner of the property—not Johnson. It does not seem to me that these exhibits attached to the amended motion force any such conclusion. For all that appears in the record, the returns of Theodore Goldstein may be false. He may have been untrue to his trust when he performed these acts of ownership and dominion.

In that event his acts with reference to this property, would not be in conflict with the testimony of his father, William Goldstein. However, the defendants say that since William Goldstein represented his son in leasing the property and collecting the rents and since, as the defendants assert in their amended motion and in their briefs, William Goldstein procured these income tax returns from Theodore Goldstein and filed them, he was therefore a party to Theodore Goldstein's acts and representations of dominion and ownership over the property.

But the defendants do not disclose all the circumstances surrounding the renting of this property and the disposition of the rents. The evidence on the original motion for a new trial for newly discovered evidence showed that in September 1941, the property had been leased by William Goldstein, as agent of Theodore Goldstein, to the Hines Realty and Construction Company for a period of five years. William Goldstein is reported to have said that the rents which he collected were being held by him, although not in a separate fund, for whoever was the true owner of the premises and that he had been served with a notice by the Bureau of Internal Revenue to hold all property and funds of William R. Johnson.

The Government, in response to the present amended motion for a new trial, has shown by the affidavits of William Goldstein and Theodore Goldstein that Theodore Goldstein was merely the holder of the legal title and had no other interest of any kind whatsoever in the property. The Government has also shown that the income tax returns on which Theodore Goldstein returned the rentals from the Albany Park Building were all either delinquent or amended returns. For the years 1937 to 1940, he had filed no returns at all and in 1941, 1942, and 1943, when he had voluntarily filed returns, he had made no claim to rentals from the Albany Park Building.

It appears that the filing of these delinquent and amended returns came about when on April 17, 1944, Edward H. Schultz of the Bureau of Internal Revenue in Chicago was advised by an anonymous telephone communication that the income from the Albany Park Building had not been reported by anybody but that rents were supposedly being paid to William Goldstein who claimed to be agent for Theodore Goldstein. Mr. Schultz assigned Mr. Stanley A. Wodrick, a deputy collector, to conduct an investigation. Mr. Wodrick talked to the tenant of the building and thereafter contacted William Goldstein. Mr. Wodrick insisted that Theodore Goldstein was the owner and was the person obligated to report the rents received from the property since the title still stood in his name. William Goldstein objected, saying that

Theodore Goldstein was not the actual owner but was only the title holder of record. Mr. Wodrick called on William Goldstein about ten times thereafter, each time contending that Theodore should return the rents in his income tax returns. But William Goldstein continued to protest that his son was not the real owner of the building and was not under a duty to return the rents.

Representatives of the Bureau of Internal Revenue sought to get William Goldstein to sign a written memorandum containing the following recital:

"I have acted as attorney and agent for my son, Theodore, the owner, in the management of the property located at 3424 Lawrence Avenue, Chicago, Illinois, purchased for my son Theodore in 1937. * * *"

William Goldstein, according to Mr. Schultz, "would not sign any affidavit containing any statement that his son Theodore was 'the owner' of the property located at 3424 Lawrence Avenue, Chicago, Illinois, or containing any statement that he purchased that property for his son, Theodore."

The representatives of the Bureau of Internal Revenue not only insisted that Theodore Goldstein was required to return as his individual income the rentals from the Albany Park Building, but also claimed that the entire sum paid as purchase price for the property was income to Theodore Goldstein in 1937, the year when the property was purchased, and demanded payment of more than \$13,000 as that year's tax. William Goldstein emphatically denied that his son should assume this liability.

However, after numerous demands by the Bureau that Theodore Goldstein return the rentals on his individual income tax returns and after threats to assess the much larger tax claimed against Theodore Goldstein if he refused, William Goldstein acquiesced. Delinquent returns for the years 1937, 1938, 1939, and 1940, and amended returns for the years 1941, 1942, and 1943, were prepared by the representatives of the Bureau of Internal Revenue and delivered to William Goldstein. He obtained his son's signature on the returns and paid the tax on behalf of his son. The rents collected were sufficient to cover the tax.

The anonymous manner in which the delinquency was reported, the compulsion under which the returns were made, and the continued insistence of both Theodore Goldstein and his father that Theodore was not the owner of the property, but merely the title holder of record, are corroborated by the agents of the Bureau of Internal Revenue and are not disputed by the defendants in any respect. Returns made under these circumstances were not the voluntary returns of Theodore Goldstein and were inconsistent

with his own view of his relationship toward this property, and with the view of William Goldstein.

The District Court, having considered these additional facts shown on the amended motion together with the facts previously before it on the original motion for a new trial on the ground of newly discovered evidence, again reached the conclusion that William Goldstein did not commit perjury on the original trial of the defendants and that he has not since recanted.

The facts added to the records in this proceeding which show the making and filing of the delinquent and amended income tax returns filed by William Goldstein, together with the circumstances under which they were made and filed, do not prove that William Goldstein voluntarily took a position that the property in question was the property of Theodore Goldstein.

Although the leasing and granting of the option to lease showed dominion over the real estate, there is no evidence that William Goldstein held for, or ever paid to, Theodore Goldstein, the rents collected.

The additional evidence adduced in support of the amended motion adds nothing to the proof that was submitted to us on the original motion for a new trial on the ground of newly discovered evidence. In affirming the action of the District Court in the original proceeding in 142 F. 2d 588, we said at page 591:

"In this case, the District Court found that Goldstein had not testified falsely or recanted. The court had before it for consideration not only the motion for a new trial and the supporting affidavits but, as the trial court, it had also the record made upon the trial and the demeanor of Goldstein and others upon the stand. The trial court also had for consideration Goldstein's affidavits in denial of the so-called newly discovered evidence and the affidavits of others supporting Goldstein. Several of those who made affidavits for the defendants in support of their motion were witnesses at the trial. So it was not merely a printed record that the District Court had before it.

"We cannot say, in the light of the whole record before the District Court, that the so-called newly discovered evidence inevitably leads to the conclusion that Goldstein had testified falsely. We cannot say, as a matter of law, that the District Court erred in its finding. Since the District Court found that there was no false testimony or recantation by Goldstein, the rule discussed in the Larrison case is not applicable.

"Having decided that there was no recantation or false swearing by Goldstein, the District Court then considered the case as any other motion for a new trial on newly discovered evidence would be considered. On such consideration, the court found that the

rule for such motions has never been better nor more succinctly stated than in *Berry v. Georgia*, 10 Georgia 511, which he quoted as follows:

"Upon the following points there seems to be a pretty general concurrence of authority, viz: that it is incumbent on a party who asks for a new trial, on the ground of newly-discovered evidence, to satisfy the court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict if the new trial were granted. 4th. That it is not cumulative only; viz: speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th. a new trial will not be granted, if the only object of the new testimony is to impeach the character or credit of a witness."

"This is the general rule applicable where there has been no showing of recantation or false swearing and the effect of the newly discovered evidence is considered in its relation to a possible new trial. This rule has been followed in the Federal cases and is of almost universal application among the States."

The District Court, having again found that William Goldstein did not commit perjury or recant, has reached a conclusion upon the whole record which I cannot say is unreasonable nor an abuse of discretion. I agree with the District Court that the additional evidence adduced on the amended motion for a new trial on the ground of newly discovered evidence is insufficient to support such a motion, because it is merely cumulative and impeaching, and would probably not produce a different verdict if a new trial were granted.¹

I would reaffirm all we said in *United States v. Johnson*, 142 F. 2d 588. Everything we said there is entirely in harmony with the finding and judgment of the District Court in the case now before us. The judgment of the District Court should be

Affirmed.

And on the same day, to wit: On the second day of May 1945, the following further proceedings were had and entered of record, to wit:

Wednesday, May 2, 1945

Court met pursuant to adjournment.

Before: Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. J. EARL MAJOR, Circuit Judge; Hon. SHERMAN MIXTON, Circuit Judge.

¹ See authorities cited *United States v. Johnson*, 142 F. 2d 588 at page 592.

7500

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WILLIAM R. JOHNSON, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the
Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court with directions that the motion for new trial be allowed.

7501

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY, AND
STUART SOLOMON BROWN, DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the
Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court with directions that the motion for new trial be allowed.

United States Circuit Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the Opinion filed May 2, 1945, and Judgment entered on the same day, in Cause No. 7500-7501, The United States of America, Plaintiff-Appellee vs. William R. Johnson, Defendant-Appellant; The

United States of America, Plaintiff-Appellee vs. Jack Sommers, James A. Hartigan, William P. Kelly, and Stuart Solomon Brown, Defendants-Appellants, as the same remain upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-third day of May A. D. 1945.

[SEAL]

KENNETH J. CARRICK,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

Supreme Court of the United States

No. 115, October Term, 1945

Order allowing certiorari

Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice MURPHY, Mr. Justice JACKSON, and Mr. Justice BURTON took no part in the consideration or decision of this application.

Supreme Court of the United States

No. 116, October Term, 1945

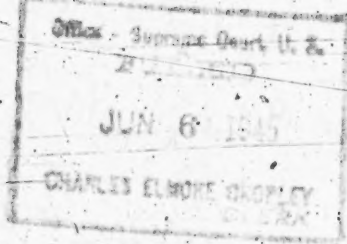
Order allowing certiorari

Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice MURPHY, Mr. Justice JACKSON, and Mr. Justice BURTON took no part in the consideration or decision of this application.

FILE COPY



115 116
Nos. ~~1354~~ and ~~1355~~

In the Supreme Court of the United States

OCTOBER TERM, ~~1944~~ 1945

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM R. JOHNSON

THE UNITED STATES OF AMERICA, PETITIONER

v.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P.
KELLY AND STUART SOLOMON BROWN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1354

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM R. JOHNSON

No. 1355

THE UNITED STATES OF AMERICA, PETITIONER

v.

JACK SOMMERS, JAMES HARTIGAN; WILLIAM P.
KELLY AND STUART SOLOMON BROWN

*PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Seventh Circuit (AR. 237),¹

¹ The record in this case consists of three separately printed records, the original record in this Court on review of respondents' convictions (Nos. 4 and 5, 1942 Term); the record made on respondents' petition for certiorari for review of the

reversing the judgment of the District Court and granting the respondents a new trial.

OPINIONS BELOW

Neither the memorandum opinion of the District Court denying respondents' amended motion for a new trial (AR. 133-169) nor the majority and dissenting opinions in the Circuit Court of Appeals (AR. 207-236) are as yet reported. The prior, unanimous opinion of the court below affirming the District Court's denial of respondents' original motion for a new trial (R. 578-585) is reported at 142 F. 2d 588. The memorandum opinion of the District Court on the original motion (R. 460-516) is not reported. The prior opinions of the Circuit Court of Appeals and of this Court on appeal from the respondents' convictions are reported at 123 F. 2d 111, and 319 U. S. 503, respectively.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 2, 1945. (AR. 237.) The jurisdiction of this Court is invoked under Sec-

judgment of the Circuit Court of Appeals affirming the action of the District Court in denying respondents' subsequently filed motion for a new trial (Nos. 153 and 154, 1944 Term); and a record of additional proceedings on respondents' amended motion for a new trial. The first record on the motion for a new trial will be referred to by the designation "R." and the record of additional proceedings on the amended motion by the designation "AR." Reference to the original record on review of respondents' convictions will be shown by record references to Nos. 4 and 5, 1942 Term.

tion 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court on May 7, 1934.

QUESTION PRESENTED


Whether the court below applied improper standards in reviewing and reversing the action of the District Court denying respondents' second, amended motion for a new trial based on allegedly newly discovered evidence that a Government witness testified falsely at respondents' trial.

STATEMENT

Respondents' convictions were affirmed by this Court on June 7, 1943. Execution of the Court's judgment has been delayed since that time by proceedings on respondents' subsequently filed original and amended motions for a new trial which purportedly were based on alleged newly discovered evidence that William Goldstein, a Government witness, testified falsely at the trial. After affirming the action of the trial court in denying respondents' original motion, the Circuit Court of Appeals, with one judge dissenting, has now held that the respondents are entitled to a new trial.

The history of the proceedings and the nature of the review in the court below necessitate a somewhat extended statement of facts.

PRIOR PROCEEDINGS

On March 29, 1940, an indictment in five counts was returned against the respondents and others in the District Court for the Northern District of Illinois. The first four counts charged the defendant Johnson with willful attempts to defeat and evade a large part of his income taxes for the calendar years 1936-1939, inclusive, and charged the other defendants with willfully aiding and abetting Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy. All respondents except Brown were found guilty on all five counts. Brown was found guilty on Counts 3 and 4, the substantive counts for 1938 and 1939, and on the conspiracy count. Johnson was sentenced to concurrent sentences totaling five years' imprisonment and a \$10,000 fine. Lesser concurrent sentences were imposed on the other respondents. *United States v. Johnson*, 319 U. S. 503, 505-506. 

On appeal from the judgments of conviction, the Circuit Court of Appeals reversed principally on the ground that the indictment was returned by an illegally constituted grand jury. *United States*

² The indictment was dismissed as to four defendants prior to trial, three defendants were acquitted by the jury, and the defendant Flanagan died pending review of the judgment of conviction against him. See R. 461, n. 1; *United States v. Johnson*, 319 U. S. 503, 520, n. 1.

v. *Johnson*, 123 F. 2d 111 (C. C. A. 7). This Court granted certiorari and reversed the decision of the Circuit Court of Appeals (319 U. S. 503), sustaining the convictions of all respondents.

On June 25, 1943, three weeks after this Court affirmed the convictions, counsel for respondent Johnson wrote to the Attorney General, charging that Goldstein had committed perjury, requesting that an investigation be made and criminal proceedings instituted against him, and submitting affidavits intended to prove the charge of perjury. (R. 60-80, 159.) An extensive investigation was conducted by the Government, the results of which demonstrated to us that Goldstein had not testified falsely at the trial. (See letter written by the Solicitor General, as Acting Attorney General, to respondents' counsel on September 13, 1943, R. 265-266.)

In the meantime respondents took steps to and subsequently did obtain a remand of the case to the trial court for the filing of a motion for a new trial. (R. 9-10.) The motion (R. 13-17), filed on October 29, 1943, with leave of the trial court (R. 12), purported to be based on allegedly newly discovered evidence that Goldstein had testified falsely at respondents' trial. Numerous affidavits were submitted in support of the motion (R. 81-242) and others were filed later (R. 336-338). Respondents also submitted a brief in support of the motion (R. 17-55) and the Government filed an answer (R. 55-58), a brief in opposition (R.

280-314), and a number of affidavits (R. 243-279, 315-316, 339-453). A hearing on the motion was had on November 15, 1943 (R. 454), before Judge Barnes (see R. 534-536); who had presided at the respondents' trial (Nos. 4 and 5, 1942 Term, 1 R. 1). The trial court filed a comprehensive opinion on December 28, 1943 (R. 460-516) and three days later entered an order denying the motion (R. 534-536).

On appeal the Circuit Court of Appeals unanimously affirmed the order of the trial court. (*United States v. Johnson*, 142 F. 2d 588 (C. C. A. 7; R. 578-586). In doing so the court stated that it had "carefully considered the record before us and the action of the trial court" (R. 583), that it could not say "that the so-called newly discovered evidence inevitably leads to the conclusion that Goldstein had testified falsely" (R. 584) and that the trial court had not abused its discretion in denying the motion (R. 583, 584, 575).

Respondents then filed a petition for certiorari (Nos. 153 and 154, 1942 Term), which we opposed. Shortly before the convening of the 1944 term of this Court and while the petition for certiorari was pending, counsel for respondents requested the Government to inform the Court that Theodore Goldstein, William Goldstein's son, had recently filed income tax returns covering the rentals from the Albany Park Bank Building. In line with his testimony with respect to other

properties, Goldstein had testified that he purchased the Albany Park Bank Building at respondent Johnson's request with money furnished by Johnson and took title in the name of his son Theodore, and that subsequently a quitclaim deed on the building was delivered to Johnson. (Nos. 4 and 5, 1942 Term, 2 R. 56-57.)

Through an investigation conducted by the Bureau of Internal Revenue, we verified the fact that amended and delinquent income tax returns on the Albany Park Bank Building had recently been filed by Theodore Goldstein, and also ascertained the circumstances under which they were filed, which were, briefly, that the revenue agents in Chicago, ignoring Goldstein's protestations that his son was only the record title holder and not the actual owner of the building, had insisted on the filing of the returns on the theory that Theodore was liable for tax on the rents from the building because he was the record title holder. While we believed that the circumstances under which the returns were filed were such as to dissipate any relevance the filing of the returns might otherwise have had, we acceded to respondents' request. In a supplemental memorandum in opposition we informed the Court of the filing of the returns and of the circumstances under which they were filed. On motion of the present respondents, the Court deferred consideration of the petition for certiorari conditioned upon the

prompt filing in the Circuit Court of Appeals of a motion to reopen proceedings on the motion for new trial and until the disposition of the motion by the Circuit Court of Appeals. (AR. 20-21.) This resulted in the second remand to the trial court (AR. 18-19) and dismissal of the petition for certiorari.

Pursuant to motion of the respondents (AR. 23-25), the trial court ordered the production of the income tax returns filed by Theodore Goldstein (AR. 26-27). Respondents then filed an amended motion for a new trial (AR. 27-28), relying primarily on the filing of the returns by Theodore Goldstein to show that William Goldstein testified falsely at the trial.⁹ The Government filed an answer together with several affidavits which showed the innocuousness, so far as the charge against Goldstein was concerned, of the filing of the returns by Theodore Goldstein. (See AR. 87-112.) Respondents filed a reply (AR. 112-132) and the hearing on the motion, held on December 11, 1944, was again before Judge Barnes, the trial judge (AR. 133). On December 15, 1944, Judge Barnes filed an opinion in which he exhaustively reviewed the history of and proceedings in the case (AR. 133-169) and again entered an order denying the motion for a new trial (AR. 171-173).

On this appeal, the majority of the Circuit Court of Appeals (Major, C. J., and Sparks, C. J.) held that the trial court had abused its dis-

cretion in denying the motion, basing its opinion primarily on the evidence submitted on the *original* motion. (AR. 207-230.) Judge Minton dissented, stating, among other things, that additional evidence adduced in support of the motion added nothing to the proof that was submitted to the court on the original motion when the court, through the same three judges, had, after having "carefully considered the record" (p. 583), affirmed the action of the trial court in denying the motion (AR. 230-236). It is this action of the majority in granting respondents a new trial which we are now requesting this Court to review.

TRIAL BACKGROUND OF CASE

Theory of prosecution—"ownership of gambling houses" and "expenditure" theories of proof

The trial theory of the prosecution was that respondent Johnson was the proprietor of a number of gambling houses in and around Chicago from which he derived large amounts of unreported income, and that other defendants posed as the owners, thereby concealing Johnson's interest. The Government undertook to show that the various gambling houses, although ostensibly separately owned, were actually operated as a unit, thus indicating central control and ownership, and that Johnson was so identified with the gambling houses as to prove that he was the true owner. Considerable evidence was also introduced to show

the magnitude of the operations of these houses, including their currency exchange transactions which reflected income to Johnson in excess of the amounts he reported in his income tax returns. The evidence on this aspect of the case has been referred to throughout the proceedings as the "ownership" theory of proof. As this Court's opinion in the case shows, this was the predominant part of the Government's case. This Court stated that the evidence "amply justified" the jury in finding that the gambling houses were under a single domination and that Johnson owned a proprietary interest in the network of gambling houses and was not merely a patron or an occasional accommodating dealer when other patrons desired to play for stakes beyond the conventional limit (319 U. S., at 516-517) and that the jury, having been justified in finding that the individual defendants were screens behind which Johnson operated, was also justified by "solid proof" in finding that there were winnings from these houses on which Johnson attempted to evade income tax payments. The testimony of Goldstein, now held to be false by the Circuit Court of Appeals, had little bearing on this, the "ownership" theory of proof, which turned on the issue of the proprietorship of gambling houses.

Goldstein's testimony was a part of the "expenditure" theory of proof which this Court stated "reinforced" the conclusion that Johnson had large, unreported income. (319 U. S. at 517.)

The proof on this theory was designed to show that Johnson's cash expenditures during each of three of the four years covered by the indictment were in excess of his available cash resources and reported income. Our showing on some of these expenditures was made initially through the testimony of Goldstein who, like some of the persons who testified for the Government in connection with the "ownership" theory of proof, was an "obviously unwilling" witness for the Government.³ (319 U. S. at 516.)

Goldstein's testimony

Goldstein was shown certain escrow agreements, later introduced in evidence, which revealed practically all of the details of the purchase of several

³ It will be seen later that Goldstein's testimony regarding the purchase of certain properties necessarily had to concern either respondent Johnson or William R. Skidmore or both. Goldstein had acted as attorney for Skidmore (Nos. 4 and 5, 1942 Term, 2 R. 65) and by Johnson's own admission had also acted for Johnson in the purchase of two of these properties (*id.*, 3 R. 982-983; see also *id.*, 3 R. 974, 975; 4 R. 8). Both Goldstein and Skidmore had been indicted with Johnson and the other respondents, as Goldstein testified on cross-examination (*id.*, 2 R. 65). While the indictment was dismissed as to them before trial, Skidmore was later convicted of income tax evasion on a previous indictment under the "expenditure" theory of proof—proof which did not, however, involve any of the properties as to which Goldstein testified in this case. See *United States v. Skidmore*, 123 F. 2d 604 (C. C. A. 7), certiorari denied, 315 U. S. 800 (No. 813, 1941 Term). Goldstein was already under indictment for perjury, as he also testified on cross-examination (Nos. 4 and 5, 1942 Term, 2 R. 65).

properties and of two escrow deposits on unconsummated sales, including the fact that Goldstein was the purchaser and that, as to all of the purchased properties except one (Sunny Acres Farm), title had been taken in someone else's name, e. g., his law partner Isador Goldstein, or his son Theodore, or one of his stenographers, these persons apparently still being the title holders of record. This resulted in testimony by Goldstein which consisted of facts shown by the escrow agreements and the following three facts testified to with respect to each item: That he made payment in currency; that the money was given to him by respondent Johnson with the request that he make the purchase or escrow deposit, as the case might be; and that a quitclaim deed was subsequently delivered to Johnson, except in the case of the two escrows involving unconsummated sales. (Nos. 4 and 5, 1942 Term, 2 R. 55-62.) The properties involved were as follows (*ibid.*):

Sunny Acres Farm (consisting of two parcels, one of Sunny Acres and one of adjoining Du Page County real estate, purchased separately);

Bon Air properties (which included the Bon Air Country Club, the Green House, the White House, and a gas station, all purchased separately);

Curran Farm (adjacent to the Bon Air properties);

Albany Park Bank Building (in which was located the Lawrence Avenue Currency Exchange, operated by respondent Brown and used by Johnson's gambling house operators, and the Albany Park Safe Deposit Vault Company);

9730 So. Western Avenue (in which the Western Club, a gambling establishment, was operated for a time by the defendant Creighton); and

The Dells.

The two escrow deposits were in the amounts of \$10,000 and \$7,500, the \$10,000 deposit being made on property lying between Bon Air and the Curran Farm.

Relationship of Goldstein's testimony to "expenditure" theory of proof

The full purchase prices of these properties, as well as the amounts of the two escrows, were included in the Government's computation of Johnson's expenditures and cash receipts, the computation showing a total excess of expenditures over cash receipts in the amount of \$640,387.86 for the period 1932 to 1939, inclusive. (See chart attached to the inside of the back cover of our Brief on Reargument, Nos. 4 and 5, 1942 Term.) That a part of these property and escrow expenditures was properly charged to Johnson was verified by Johnson's own testimony. He corroborated Goldstein's testimony regarding the

purchase of the ~~Sunny Acres~~ Farm and adjoining real estate, admitting full ownership of those priorities (*id.*, 3 R. 982-983), and stated that he had paid one-half of the purchase price of each of the other properties except the Albany Park Bank Building, admitting to one-half ownership of them.⁴

Otherwise, Goldstein's testimony was pertinent only insofar as it tended to corroborate the Government's position as to two other expenditure charges against Johnson—the amounts expended for improvements on Bon Air and the property at 9730 So. Western Avenue. On the chart we submitted to this Court with our Brief on Re-argument (*supra*, p. 13), the total amount charged against Johnson on Bon Air (including the Curran Farm), mostly for improvements, was \$707,645, whereas Johnson said he and William R. Skidmore each owned a one-half interest in the property and that he, Johnson, had spent only approximately \$354,000 as his one-half share of the cost, maintenance and operation of the property. (*Id.*, 3 R. 955-956, 983.)⁵ The improvements on the property at 9730 So. Western Avenue amounted to only \$22,400. At the trial, the charges of expenditures for improvements on these two properties raised the issue whether Johnson was the sole owner of the properties or only a one-half owner with Skidmore, the Bon Air charge being

⁴ Nos. 4 and 5, 1942 Term, 3 R. 950, 952, 955-957, 960-961.

the only item of substantial amount. A great deal of evidence was introduced by both the prosecution and defense on the issue of ownership of Bon Air and the issue was submitted to the jury through the testimony of expert witness Clifford (*id.*, 4 R. 4-52), who testified for the Government, and of expert witness Sullivan (*id.*, 3 R. 991-995), who testified for the defense.

Goldstein's testimony clearly had no significant effect on the jury's conclusions regarding these disputed expenditure items. The computation by Government witness Clifford was submitted to the jury at the end of the Government's case in chief and through his testimony the jury was advised that, on the basis of the Government's evidence, the total of the excess of Johnson's expenditures over cash receipts was \$474,349.54. (*Id.*, 4 R. 15.) When Johnson took the witness stand later he admitted expenditures of approximately \$200,000 not charged against him by the Government. (R. 513-514.) This more than covered the total disputed amount on the purchase of the properties and the two escrow deposits. No further computation was submitted to the jury including these additional expenditures.⁵ And, while Goldstein's testimony corroborated the Government's position

⁵The admitted additional expenditures were added to the chart we submitted to this Court in our Brief on Reargument, that chart showing a total excess of expenditures over cash receipts of \$640,387.86 after minor adjustments on some of the other items.

that Johnson was the sole owner of Bon Air and chargeable for the full amount expended for improvements on that property, Goldstein's testimony was not the basis of the charge for the Bon Air improvements nor could it have been regarded by the jury as anything more than corroborative evidence. In the first place, as will be shown later, Goldstein made it plain on cross-examination that he was testifying as to who gave him the money to purchase these properties, not as to the extent of Johnson's ownership in them. Secondly, the Government introduced direct proof that Johnson was the sole owner of Bon Air, including Johnson's own prior admissions and his statements to an accountant to the effect that he alone had paid for the Bon Air properties and improvements thereon.⁶ The issue whether Johnson was

⁶ Two revenue agents related a conversation which they had with Johnson in November of 1939. Both stated that Johnson told them he was the owner of 9730 So. Western Avenue and of Bon Air. (Nos. 4 and 5, 1942 Term, 2 R. 117-118; 4 R. 8.) One testified that Johnson said nothing as to whether Skidmore had an interest in the property at 9730 So. Western Avenue although he had asked him. (*Id.*, 2 R. 118.) An accountant testified that Johnson told him that all of the stock of the Bon Air Catering Company, the corporation which operated Bon Air, should be charged to him (*id.*, 3 R. 775-776) and that the cost of improvements on the Bon Air property entered on the catering company books as assets and credited to Johnson and others was all advanced by him (*id.*, 2 R. 53-54). Johnson also made the latter statement to a revenue agent in November of 1939: (*Id.*, 4 R. 8.) In a formal statement given by Johnson on March 27, 1939, and introduced in evidence, Johnson stated that he had had no business

the sole or only one-half owner of Bon Air (including the Curran Farm), and thus chargeable with more than he admitted expending on the properties, was also the subject matter of considerable evidence introduced by the defense.⁷ For present purposes, however, the important fact is that Goldstein's testimony could have had only slight, if any, weight in the minds of the jury in

transactions with Skidmore, except a loan he had made to Skidmore. (*Id.*, 2 R. 411.) Skidmore's name did not appear on the Bon Air records. (*Id.*, 3 R. 900, 913, 982.) For a more detailed summary of the Government's evidence on this ownership point, see our Brief on Reargument, Nos. 4 and 5, 1942 Term, pp. 102-104, 106-107. In that brief we of course included Goldstein's testimony in our summary of the evidence supporting submission of the full amount of the Bon Air expenditures to the jury.

Johnson asserted that William R. Skidmore owned a one-half interest in the Bon Air properties and Curran Farm (as well as in The Dells and property at 9730 So. Western Avenue); that Skidmore had paid one-half of the expenses on these properties; that Skidmore had bought the properties but did not want title taken in his name; and that title stood in his, Johnson's, name. (*Id.*, 3 R. 955-957, 961-965, 967-970, 979, 982, 983-984.) The defendant Wait, formerly employed at Bon Air, gave similar testimony. (*Id.*, 3 R. 896-898, 900, 910-913.) Two witnesses testified to facts tending to show that Skidmore was involved in the purchase of Bon Air. (*Id.*, 3 R 575-Ex. J-6, 576. See also 3 R. 914-915.) Four witnesses recited instances of payment of Bon Air bills by Skidmore or charges to him. (*Id.*, 2 R. 81; 3 R. 916-917, 919-920 (Ex. J-7A to J-7E, 3 R. 1037), 930.) Several former Bon Air employees testified to acts of ownership by Skidmore. (*Id.*, 3 R. 893-894, 916, 922, 923, 925, 928; see also *id.*, 3 R. 956.) For a more detailed summary of respondents evidence, see Brief of William R. Johnson on Re-Argument, No. 4, 1942 Term, pp. 76-78.

connection with the charge of Bon Air improvements.

The question whether Johnson had actually made these disputed expenditures was itself only an incidental issue. Even if all of the Government's evidence regarding these properties and two escrows were rejected and Johnson's testimony as to all of them accepted in full, including his testimony that he spent some \$350,000 less on Bon Air and the Curran Farm than he could be charged with having expended on the basis of the Government's evidence, Johnson's expenditures would still exceed his cash receipts by a substantial amount (R. 543-514), showing that Johnson had unreported income. The Government was not of course required to prove the exact amount of Johnson's unreported income, as this Court has stated. (319 U. S. at 517.) Accordingly, the exclusion of all of these disputed expenditure items would not alter the fact that the "expenditure" theory of proof reinforced the "ownership" theory of proof. In addition, the jury may have convicted respondents on the "ownership" theory of proof alone, the evidence on that theory being amply sufficient of itself to support the convictions, as this Court has held (*supra*, p. 10).

Cross-examination of Goldstein

The respondents have consistently attempted to obscure the actual extent of Goldstein's testimony,

asserting that Goldstein placed the ownership of these properties in Johnson, and have finally persuaded the Circuit Court of Appeals to accept this view. It is pertinent therefore to ascertain whether Goldstein's testimony may have been so interpreted by the jury.

As already stated, Goldstein circumspectly testified that he purchased these properties and made the two escrow deposits at Johnson's request with money furnished him by Johnson and that subsequently quitclaim deeds were delivered to Johnson. On cross-examination, Goldstein stated that he did not know whether Johnson got full title to the property at 9730 So. Western Avenue and was not sure whether anyone else was interested in the property. (Nos. 4 and 5, 1942 Term, 2 R. 64.) After being shown the deeds to Johnson, he recollected that Johnson received an undivided one-half interest by conveyance from Ann Homan and her husband, who got title through Isadore Goldstein, Goldstein's nominee, and stated that, as he remembered, Skidmore got the other half. (*Id.*, 2 R. 64, 65.) He reiterated, however, that he was positive it was Johnson who gave him the money to make the purchase. (*Id.*, 2 R. 66.) As to The Dells property, Goldstein testified on cross-examination that "I don't know, but that may be so, that Mr. Johnson only owns half of the Dells property and only paid half of the price." (*Id.*, 2 R. 67.) Accordingly, Goldstein's testimony was

that Johnson was *not* the sole owner of the property at 9730 So. Western Avenue and might not be the sole owner of The Dells, despite the fact that Johnson had given him the money to purchase both properties.

Goldstein's testimony therefore clearly reflected that he was testifying as to who gave him the money to purchase the properties, not as to who owned them. The limited scope of his testimony is especially apparent in connection with the property at 9730 So. Western Avenue. Since he testified that Johnson only owned a one-half interest in that property, his testimony could hardly be taken as evidence that Johnson was the sole owner and thus chargeable with the full amount of the expenditures for improvements on the property.

Significantly, Goldstein was not cross-examined at all with respect to any of the other properties or either of the two escrows, Johnson's counsel stating that they had no further information bearing on the matters regarding which Goldstein had testified. (*Id.*, 2 R. 67.) Although Goldstein was kept under subpoena by respondents until the close of the trial six weeks later, no attempt was made to cross-examine him further. (R. 488-489.)

Corroboration of Goldstein's Testimony

Goldstein's testimony is in large part corroborated by the trial record or not disputed. Re-

spondent Johnson himself corroborated Goldstein's entire testimony with respect to the purchase of the Sunny Acres Farm and adjoining Du Page County real estate, admitting that he was the sole owner of the two pieces of property. (Nos. 4 and 5, 1942 Term, 3 R. 982-983.) Title to the Du Page County property, like the other properties as to which Goldstein testified, was taken in the name of a nominee, Isadore Goldstein, and a quitclaim deed subsequently delivered to Johnson. (*Id.*, 2 R. 60.) The deeds to Johnson for the property at 9730 So. Western Avenue were in evidence, showing that a one-half interest was conveyed to Johnson, as Goldstein said. (*Id.*, 2 R. 64.) Johnson admitted that he owned a one-half interest in The Dells (*id.*, 3 R. 955, 977), from which it may be inferred that he received a deed for at least the one-half interest Goldstein unequivocally testified he had. Then there was Johnson's admission, now corroborated by the affidavits of March and Peacock (*infra*, p. 38), that Goldstein transferred full title for Bon Air to him and also delivered the deeds to him (*id.*, 3 R. 973-974), facts which not only corroborate Goldstein's testimony that quitclaim deeds to the Bon Air properties were delivered to Johnson, but tend to prove that it was Johnson who gave Goldstein the money to purchase the properties, regardless of whether Johnson may later have

quitclaimed a one-half interest to Skidmore. Further, Johnson's admission that he had a one-half interest in Bon Air, the Curran Farm, The Dells and the property at 9730 So. Western Avenue (*id.*, 3 R. 969, 973, 977, 982, 983) made it as likely as not that he had been the one to give Goldstein the money to purchase those properties. Goldstein's testimony that he made payment in currency has never been disputed, and Johnson was the one person shown by the record to transact his business in currency, admitting that he habitually carried around \$12,000 to \$15,000 in cash in his pockets (*id.*, 3 R. 965, 976, 985-986). Further, although Johnson denied at the trial that Goldstein had purchased any of these properties for him, in November of 1939 Johnson told revenue agents that Goldstein had bought the property at 9730 So. Western Avenue for him (*id.*, 2 R. 118), that he owned that property and also Bon Air (*ibid*; *id.*, 4 R. 8) and, when asked about the cost of the properties, referred the agents to Goldstein (*id.*, 4 R. 8).

Although when he testified toward the end of the trial Johnson denied giving Goldstein the money to purchase, or of having any interest in, the Albany Park Bank Building, Goldstein's testimony with respect to this building was corroborated at the beginning of the trial by an admission which Johnson's counsel made in his opening statement in the presence of respondent Johnson.

At that time Johnson's counsel stated (*id.*, 2 R. 3-4):

We will prove that Mr. Johnson had absolutely nothing to do with this currency exchange [located in the building], had no interest in it whatever, he never cashed a check there, he never exchanged money there, he never bought a money order there, he never received a dime of income from the place.

Mr. Johnson owned either the building or an interest in the building. It was an old bank building that went broke when banks went broke in this town. It was put on the market to be sold by the receiver. Mr. Johnson either by himself or as partner with somebody bought this building as an investment. It was there being operated. The safety deposit boxes were being rented and operated for the convenience of the people in the neighborhood and for others.

We will prove that there was a woman there in charge of these safety deposit boxes

* Johnson's trial counsel later stated in a brief, when the case was first on appeal from the denial of respondents' motion for a new trial, that he was employed by Johnson the day before the case was called to trial and made his opening statement to the jury on the second day of the trial, that he "undertook to get this complicated story" in his mind in the few hours available, that he was in error in stating that Johnson had an interest in the building but that as the trial progressed he forgot about it and did not ask to make a correction after he learned the facts. (R. 334, note.)

and as Mr. Brown's attorney, Mr. Hess, has said, that this building was rented by the currency exchange for fifty dollars a month, I think it was. *The money was going to the agent who had charge of the building and being spent for any expenses to maintain the building.* Mr. Johnson got no income from this building at all, *but Mr. Johnson did own the building, * * **
 [Italics supplied.]

The agent referred to was Goldstein, for the evidence revealed that after the property was purchased Goldstein reemployed two employees and became "spokesman" for the building as well as the president of the vault company located in the building. (*Id.*, 3 R. 587, 590, 595, 599, 601.) Goldstein's agency will be seen to explain many of his subsequent actions with respect to the building—actions now relied upon by respondents as showing the falsity of his testimony.

It is apparent therefore that the issue as to the falsity of Goldstein's testimony is narrowed to his testimony that Johnson gave him the money and requested him to purchase the properties in question and to make the two escrow deposits. Even this part of his testimony is inferentially corroborated by the facts in evidence.

ALLEGEDLY NEWLY DISCOVERED EVIDENCE ADDUCED ON MOTIONS FOR NEW TRIAL

The evidence which respondents relied upon in support of their motions for a new trial may be

classified into three groups, as follows: (1) Evidence of alleged admissions by Goldstein of the falsity of his testimony; (2) statements and conduct by Goldstein allegedly inconsistent with his trial testimony; and (3) evidence which is either hearsay or merely cumulative of similar evidence introduced at the trial on the issue whether Johnson was the sole owner of some of these purchased properties.

Evidence of alleged admissions by Goldstein of the falsity of his testimony

Hess, respondent Johnson, and Johnson's brother.—Respondents presented the affidavits of Hess, counsel for Johnson's co-defendants at the trial; respondent Johnson; and Johnson's brother, John E. Johnson, an attorney. These affidavits all describe a discussion in Hess' office which took place sometime during the period February to April, 1941, when Hess was writing his brief on appeal from respondents' convictions. (R. 245.) All three affidavits contain almost identical language, such as that Johnson said to Goldstein "Why did you lie?" and that Goldstein replied in substance that "he was sorry that he did but that he was a victim of circumstances." (R. 126-127, 221-222, 234.) Johnson adds that such statements by him and Goldstein were repeated a number of times and that Goldstein said "that he was sorry that he testified as he had." (R. 234.) These affidavits, intended to convey the idea that

Goldstein admitted the falsity of his testimony, are shown by the record to be misleading. Hess was interviewed and asked to clarify some of the statements in his affidavit; he signed a memorandum of the interview which contained the following (R. 246):

With respect to the statement in Affidavit No. 19, "Goldstein replied in substance that he was sorry that he did." Mr. Hess informed me that he is unable to clarify this statement since that is his best recollection of what was said. Whether Goldstein was endeavoring to excuse himself to Johnson for having testified against Johnson, or was conceding falsity, Mr. Hess would not say.

Thus, Hess, who says he was present during the entire discussion (R. 228), would not say that Goldstein had admitted that he testified falsely, despite the fact that Goldstein is supposed to have made the same statements numerous times. The obvious interest of these affiants, as well as the fact that the alleged statements were made in 1941, shortly after the trial, and were not then adduced, also has a bearing on the weight to be given the affidavits. Reciting these facts, the trial court rejected the affidavits as worthy of but little consideration. (R. 478-479.)

Green.—Only one affiant unequivocally states that Goldstein admitted his testimony was false. Green, a disbarred lawyer working as a salesman in a bakery shop (R. 477), made three affidavits.

In the first one he made no mention of Goldstein's alleged admission (see R. 125-126), despite the fact that respondent Johnson states that Green "volunteered to make known his knowledge and information regarding the matter" (R. 239). In his second affidavit, executed the day following the first one, Green says that "subsequent to October, 1940" (the month the trial ended); Goldstein told him that "his testimony regarding purchases of properties for the said William R. Johnson was false" and that on or about March 15, 1942, Skidmore phoned Green to come over, stated he wanted his advice concerning a partition suit filed by John E. Johnson on the Bon Air property, and that Goldstein, who was present, stated that Skidmore could not file an answer in the suit because if he did it would definitely establish that his trial testimony was false. (R. 100-101.) Green's third affidavit states that after Goldstein knew Green had executed the second affidavit Goldstein waited for Green outside the bakery shop and again admitted the falsity of his testimony.⁹ (R.

⁹ Engelbretson, an employee at the bakery, corroborates the fact that Green met someone and states that he later identified the person as Goldstein. (R. 232-233.) However, Green says that it was when he left the bakery shop that he saw Goldstein walking to and fro across the street, that Goldstein approached him, and that they then had the conversation Green relates. (R. 216.) Engelbretson, on the other hand, says that when he and Green were in the tavern next to the bakery shop he called Green's attention to the man walking to and fro across the street. (R. 232.)

216.) The trial court rejected these affidavits as too improbable to be true, it being unlikely that Skidmore and Goldstein, a lawyer, would seek the advice of Green, a disbarred lawyer, regarding the partition suit; or that Goldstein, after knowing of the execution of Green's other affidavits, would seek out Green to tell him a second time that his testimony was false; or that Goldstein would make a general admission that his testimony "regarding purchases of properties" for Johnson was false when it is uncontrovertible that a large part of it was true, including his entire testimony with respect to the Sunny Acres Farm and adjoining Du Page County property. For these reasons, the trial court concluded that Green had discredited himself. (R. 477-478.)

Statements and conduct by Goldstein allegedly inconsistent with his trial testimony

Bon Air.—Fowler, a former employee discharged by Goldstein for issuing an unauthorized check (R. 264, 265, 267-268), states that Goldstein told him that he bought Bon Air for Skidmore and that Skidmore gave him the money to buy it (R. 213). If true, this alleged statement by Goldstein is directly in conflict with his testimony that Johnson gave him the money to purchase Bon Air. However, no reason has been advanced by respondents for the acceptance of Fowler's statements in preference to those of their affiant Sperling, floorman and special guard at Bon Air

(R. 104); who states that in June, 1939, Skidmore gave Garry (cashier at Bon Air (R. 105)) a wrapped package, stating that it contained \$50,000 "to be applied against *his share of the cost of the property* and the cost and maintenance of the Club" (italics supplied) and that on several other occasions Skidmore delivered money in amounts of \$10,000 and \$20,000 to Garry, telling Garry to apply the money on his account of cost and maintenance (R. 105). Garry corroborates the fact that Skidmore gave him the \$50,000 on one occasion and \$10,000 and \$20,000 on other occasions, but states that it was for the payment of bills. (R. 107.) If Skidmore was paying for his share of the purchase price of the Bon Air properties in 1939, as Sperling testifies, he of course could not have given Goldstein the money to purchase the property in 1937, when the purchase was made. This is the property as to which Johnson admitted Goldstein had transferred full title to him. And, as the Government showed on respondents' motion, even the insurance policies on Bon Air were transferred from Theodore Goldstein, the record title holder, to Johnson. (See particularly, R. 419, 431, 445.)

Albany Park Bank Building: Tax returns.—Incongruously, part of respondents' proof that Goldstein testified falsely consists of evidence intended to show that Goldstein, rather than either Johnson or Skidmore or both, owns the Albany

Park Bank Building—the building which Johnson's counsel in his opening statement, made in Johnson's presence, stated that Johnson owned, having either purchased it himself or as a partner with somebody. Theodore Goldstein is the record title holder of the building, just as he was for Bon Air, one of the properties which Johnson contended he (Johnson) and Skidmore owned equally.

On their amended motion for a new trial respondents placed pivotal reliance upon the filing of amended and delinquent income tax returns by Theodore Goldstein on the rents from the Albany Park Bank Building (AR. 47-74), the returns being the principal new matter submitted to the trial court on the amended motion. These returns were shown to have been filed over Goldstein's protestations that his son was not the actual owner of the building and at the repeated insistence of the revenue agents that Theodore was liable for tax on the rents because he was the record title holder. (AR. 89-112.) Goldstein refused to sign a statement prepared by the revenue agents that his son Theodore was the "owner" of the property; he prepared his own statement to accompany the returns in which Theodore was described as "title holder of record."¹⁹ (AR.

¹⁹ In view of this statement and the consistent position taken by Goldstein throughout his dealings with the revenue agents, the Circuit Court of Appeals' suggestion that if

111-112.) The circumstances surrounding the filing of the returns corroborate rather than refute the credibility of Goldstein's trial testimony regarding the building, even though the affidavits of revenue agent Wodrick (AR. 104-105, 109-110), filed by the Government, reflect that Goldstein does not know whether it was Skidmore's or Johnson's money that Johnson gave him to purchase the building or, of his own knowledge, who the owner is—facts which respondents might have ascertained if they had cross-examined Goldstein at the trial regarding the purchase of this building.

Other evidence reflects instances in which Goldstein, having become "spokesman" for the building when it was purchased (*supra*, p. 24), continued to act as agent for the building. Biockus states that after the building was placed in receivership on July 26, 1943, because of a tax lien, Goldstein offered to apply the rents from the building on the delinquent taxes. (R. 198-200.) Leases were handled through Goldstein and executed in the name of Theodore Goldstein, the record title holder. (R. 200-206; AR. 76-77, 78-85.) Sampson, upon whose affidavits the Gov-

Theodore was not the beneficial owner of the property, the returns were perjurious, is incomprehensible. Whether the record title holder was legally liable for the taxes, and whether he was legally entitled to personal deductions, are of course questions not before the courts in this case.

ernment has relied, in an affidavit submitted by respondents states that Goldstein made the statement to him that "Johnson never had any interest in the property and has nothing whatever to do with it." (AR. 77-78.) The statement was supposed to have been made in a conversation regarding a lease option. It can be interpreted as meaning that Johnson has never had anything to do with the operation, maintenance or leasing of the building and must be considered with relation to the admission of Johnson's counsel that Johnson owned the building, having either bought it himself or as a partner with somebody. Naturally, Goldstein continued to act as agent for the building, for Johnson would not be likely to assert his ownership while his case was still pending in the courts and his property all tied up by a Government tax lien.

Blockus also states that in his conversations with Goldstein regarding the state tax lien on the Albany Park Bank Building Goldstein said the property was his and also that the Government had a lien on it. (R. 198-200.) Goldstein's statement that there was a lien on the property was in effect an assertion that Johnson owned the building, for the lien is one on all funds and property belonging to Johnson. (See R. 252, 249-250.)¹¹ One of

¹¹ The Circuit Court of Appeals' reaction to this tax lien was that Goldstein "had no more right to collect and retain the rent without authority from Johnson, which he did not have, than he had to collect rent on any other building to

Goldstein's alleged statements that the property was his—a statement which would be inconsistent with the statement that there was a lien on the property—was supposed to have been made when Levine and Sampson were present at the county treasurer's office. Both Levine and Sampson testified that they were present during the whole conversation between Goldstein and Blockus and that they did not at any time hear Goldstein make a statement that the property was his (R. 262-263), although, in an affidavit submitted by respondents, Levine subsequently said he did not hear all of the conversation between Goldstein and Blockus (R. 228-229).

which he was a stranger" (AR. 215) and, as to the \$7,500 escrow, referred to later, that (AR. 222)—

"If there is any method known to the law by which one man's money can be held by another under such pretext, we do not know about it. On its face it sounds unreasonable and unbelievable. The record shows that Johnson owes money to the government and, according to Goldstein, he has \$7,500 which belongs to Johnson in his possession with the government's knowledge and the government does nothing about it."

The record shows that Johnson's brother, in addition to Goldstein, has stated that there is a tax lien on Johnson's property and funds. (R. 249-250.) We are advised by the Bureau of Internal Revenue that a number of individuals and companies were served with liens on Johnson's property and funds, that Goldstein was served on April 3, 1940, and that the Government has not attempted to make collection, it being customary in cases of this kind, where there has been a criminal trial and where the matter is still pending before the Tax Court, to postpone collection until such time as a final decision has been reached as to the income tax liability.

In other words, this evidence regarding the Albany Park Bank Building merely reflects that Goldstein is continuing to act as agent for the building and that transactions with respect to it are being carried on in the name of the record title holder, in the same manner that all of Johnson's gambling establishments were operated under the ostensible proprietorship of others. This evidence does not reflect who the true owner is. The only evidence respondents offer on that point is contained in the affidavit of Miss Sommer, a former stenographer in Goldstein's office, who states that she typed income and disbursement statements of the vault company located in the building and mailed them to Skidmore (R. 165-166)—the inference being that Skidmore owns all or a part of the building. Miss Sommer's statements are refuted by Goldstein's submission of typed copies of the income and disbursements statements shown to have been prepared by a Miss Koop, an employee at the vault company. (R. 254-259.) Even if it were to be concluded from Miss Sommer's testimony that Skidmore owns part of the building, that conclusion would not be inconsistent with Goldstein's trial testimony that he purchased the building at Johnson's request with money furnished him by Johnson and subsequently delivered a quitclaim deed to Johnson.¹²

¹² The Circuit Court of Appeals considered it "illuminating" that no mention is made of the quitclaim deed to Johnson in the affidavit of Theodore Goldstein, the son, filed by

Escrows.—Respondents' evidence in respect of the two escrow deposits on unconsummated sales tends to prove only that the \$10,000 deposit belongs to either Johnson, Skidmore or Goldstein. By affidavit, Goldstein admits that when the escrow agreements were not fulfilled by the vendors he served notice cancelling them, receiving the \$7,500 escrow deposit, which he did not return to Johnson because of the Government's ~~own~~, but not receiving the \$10,000 escrow deposit. (R. 260-261.) Guild (trustee for the property involved under the \$10,000 escrow agreement, R. 138-139) and Holleran (attorney for the beneficiaries and trustee, R. 128-129) both corroborate Goldstein in his statement that the vendors had not fulfilled the terms of the \$10,000 escrow agreement (R. 130-132; cf. R. 141). Holleran and Guild state, however, that in their discussions with Goldstein respecting the withdrawal of this \$10,000 escrow deposit Goldstein said the money was his. (R. 133, 141, 214.) Henriksen, on the other hand, states that Skidmore told him the money was his. (R. 95.) More significant than this inconsistent testimony

the Government on the amended motion, and concluded that the Government has "abandoned its effort to defend this portion of William Goldstein's testimony." (AR. 218.) This affidavit related to Theodore Goldstein's tax returns and the circumstances of their filing. It was filed for the purpose of meeting the contention of respondents based upon these returns. We did not conceive of the proceedings on the amended motion as amounting to a retrial of the case by affidavit.

is respondents' own disclosure that the \$10,000 escrow agreement resulted from the institution and dismissal of a trespass suit relative to property located between Bon Air and the Curran Farm (R. 133, 141), properties in which Johnson admits he has a one-half interest.

Whatever significance the testimony of Holleran Guild and Henricksen might otherwise have is dissipated in an affidavit filed by the Government. Sullivan, attorney for Guild in the trespass suit, states that he suggested to Goldstein that there was no lien on the \$10,000 escrow and that part of it could be applied in settlement of the Bon Air trespass suit and that Goldstein refused to withdraw and pay over the money out of the escrow fund unless Sullivan obtained a letter or some form of written authority from Johnson, stating that he would follow Johnson's instructions in making disposition of the fund. (R. 250.)

Hearsay and cumulative evidence

All of the rest of the evidence submitted by respondents on their motions is either hearsay evidence or evidence which is substantially identical to that submitted at the trial by respondents. The hearsay evidence, consisting of alleged statements by Skidmore,¹³ would of course be inad-

¹³ See R. 81, 83, 84, 88-90, 93, 95, 96-97, 97-99, 109, 126. Some of this hearsay evidence is directed toward a showing that Goldstein's trial testimony as to Bon Air was false. Henricksen, the caretaker at Bon Air (R. 83-84) who testified as a state witness in the Roger Touhy and

missible on a new trial. The otherwise cumulative evidence bears only on the question whether Johnson was the sole owner or only had a one-half interest in Bon Air (including the Curran Farm) and The Dells. The evidence as to The Dells is repetitious of that produced at the trial¹⁴ and the most important part of it submitted through the affidavits of Hare and Herman, persons who testified at the trial for the defense. (R. 474.)¹⁵ The evidence as to Bon Air reflects acts of ownership of Bon Air by Skidmore,¹⁶ just as did a great deal

Hugh Banghart trials and described his own active participation in the kidnapping of John Factor (R. 277), states that Skidmore told him that he bought Bon Air, that Johnson would have a one-half interest in it but Johnson did not know about it yet, and that he bought the Curran Farm and did not intend to let Johnson have an interest in it (R. 84, 93.) Nadherny, who testified at the trial, states that he heard Skidmore say that he bought the Green House (one of the Bon Air properties) as a surprise gift to Johnson. (R. 98-99.) These statements reflect their own unreliability as proof. For instance, Henriksen states that Skidmore said he did not intend to let Johnson have an interest in the Curran Farm, whereas Johnson has admitted that he owns a one-half interest in it. Nor could the Green House have been a surprise gift to Johnson, for Johnson has admitted that he paid one-half of the cost of all of the Bon Air properties, including the Green House.

¹⁴ Cf. R. 117-118, 231-232 with Nos. 4 and 5, 1942 Term, 3 R. 926-927.

¹⁵ See also, R. 95, 175, 177-179, 189.

¹⁶ R. 81-82, 85-86, 87-88, 89, 90, 91-92, 93-94, 97, 99, 102, 103-104, 104-105, 106, 107-108, 108-109, 112-113, 114, 119, 120-122, 124-125, 125-126, 166-167, 169-170, 173, 174-175, 176-177, 186, 191-192, 192-193.

of respondents' trial evidence. Some of these affiants testified at the trial and others were subpoenaed but not called to testify. (R. 474-475.) Peacock, who also was subpoenaed by respondents (R. 342-343) but not called to testify, and Miss Marsh reveal that titles to the Bon Air properties and Curran Farm were transferred to Johnson and that deeds signed by Johnson and conveying a one-half interest to Skidmore were prepared (R. 163-164, 188). This evidence, on which the Circuit Court of Appeals has placed so much reliance (AR 224-225), was before the jury through respondent Johnson's testimony (Nos. 4 and 5, 1942 Term, 3 R. 964) and might have been corroborated at the trial by Peacock, since he was under subpoena by respondents. Aside from the fact that the preparation of deeds conveying a one-half interest in Bon Air to Skidmore is merely cumulative evidence on a trial issue, the fact that full title was first transferred to Johnson tends to support Goldstein's testimony that Johnson gave him the money to purchase Bon Air.

On the issue of the falsity of Goldstein's trial testimony, the trial court was also required to consider Goldstein's denials that he made the incriminating statements attributed to him by respondents' affiants, as well as his explanations and reiteration that it was Johnson who gave him the money to make the escrow deposits and to

purchase these properties.¹⁷ And, as we have already shown, the trial proceedings alone reflected substantial support for the conclusion that Goldstein's testimony was true in its entirety.

ACTION OF TRIAL COURT ON RESPONDENTS' AMENDED MOTION

After refreshing his recollection of what transpired at the trial both times he passed on respondents' motion for a new trial (R. 466-474, 515-516; AR. 168-169) and exhaustively reviewing the motion evidence (R. 474-514; AR. 151-167), Judge Barnes, the trial judge, concluded (AR. 167-168):

Having considered in detail each separate item of allegedly newly discovered evidence, including not only that now proposed by the movants to be presented to a jury, but also that by their motion filed in 1943 proposed by the movants to be presented to a jury, the court finds and holds that each and every such item is excluded from the classification "newly discovered evidence warranting a new trial" by at least one of the elements of the rule of law applying in such cases and above stated. All but a few items are merely cumulative of other like items presented at the trial. No adequate reason has been presented for the delay of more

¹⁷ See R. 243, 248-249, 251-252, 252-253, 254-259, 260, 260-261, 263, 265.

than four years in the presenting of these merely cumulative items. All items which are not merely cumulative, are merely impeaching. The merely impeaching items are found in the proposed testimony of defendant Johnson, John E. Johnson, a brother of defendant Johnson, Hess, attorney at the trial for Johnson's co-defendants, Fowler, a discharged employee of Goldstein, Green, a disbarred lawyer, and Sampson, who makes an affidavit filed December 4, 1944. All of the defendants have known, or are charged with knowledge of, all impeaching items which they seek to present through the testimony of Johnson, John E. Johnson, and Hess since the spring of 1941,—two and one-half years before they were called to the attention of this court. Johnson has known of the matters proposed to be related by Fowler since at least as early as September, 1942, more than one year before it was presented. No adequate reasons have been presented for these delays. The movants have not been diligent as to these items. Green's impeaching evidence is denied by Goldstein (as are all the other items) and, because of its inherent improbability and its source, is not by the court considered worthy of belief. Sampson's alleged impeaching evidence is not in fact impeaching and furthermore is denied by Goldstein. The court does not believe that Goldstein recanted, does not believe that he perjured himself on the trial and, on the contrary, believes that he was quite

circumspect. The facts are that Goldstein on the trial told (with one exception) only what the various escrow papers and records compelled him to tell. That one exception was the source of the currency that he deposited in the various escrows. His testimony as to the source of the currency is corroborated by the facts and circumstances in evidence. Johnson is the one person referred to in the evidence who habitually used currency in large amounts (and not bank checks) and habitually kept very large sums of currency on hand. Goldstein's purchase for Johnson of Sunny Acres Farms is a corroborating circumstance. Finally, the court finds and holds that the allegedly newly discovered evidence is not such or of such nature as on a new trial would probably produce an acquittal. The court concludes that the amended motion for a new trial on the ground of newly discovered evidence should be denied.

REASONS FOR GRANTING THE WRIT

1. The decision below, it is submitted, calls for review by this Court no less urgently than did the decision of the court below on appeal from the respondents' conviction. See *United States v. Johnson*, 319 U. S. 503. The majority of the Circuit Court of Appeals has ordered a new trial four and a half years after conviction, upon proceedings begun when this Court affirmed the convictions, and after those proceedings had resulted in a denial of a new trial by the Dis-

trict Court, unanimous affirmance of that denial by the Circuit Court of Appeals, and a second denial of a new trial by the District Court. A new trial has now been ordered by two of the four judges who have passed on the matter, despite the fact that virtually all the material considered by the court below was before it when it previously affirmed the denial of a new trial, and despite the earlier statement of the court below, abundantly justified, that the trial court had considered the motion for new trial "with painstaking effort and meticulous care." R. 583.) The decision is based on so serious a departure from the accepted course of review of the granting or denial of motions for new trial, and in the process discloses so great a misapprehension of the significance of the material presented, that it casts an unwarranted reflection upon the conduct of the case and opens the way to indefinite prolongation of criminal proceedings. To leave the case in its present state without submitting it to the supervisory power of this Court would be a disservice to the cause of administration of the criminal law.

The action of the majority below rests primarily upon its conclusion that the testimony of the Government's witness Golstein concerning the Albany Park Bank Building was false. The nature of that testimony and its setting in the case as a whole has been indicated in the Statement (*supra*, pp. 10-20). Goldstein testified, supplementing and explaining documentary evidence of escrow agree-

ments, that he purchased certain properties, including the Albany Park Bank Building, with currency received from Johnson, that title was taken in the name of a nominee, and that quitclaim deeds were subsequently executed to Johnson. The corroborating evidence has also been indicated (*supra*, pp. 20-24); no newly discovered motivation for falsity has been suggested.

All the proof offered in support of the amended motion for new trial concerned Goldstein's testimony relative to the Albany Park Bank Building, as the court below noted (AR. 209). In overturning the decision of the District Court and its own prior decision on appeal respecting the truthfulness of Goldstein's testimony, the court below had before it, as did the District Court in passing on the second motion for new trial, tax returns executed by Goldstein's son in the summer of 1944, which were interjected in the case on the eve of action by this Court upon respondents' petition for certiorari and the Government's opposing brief on an attempted review of the earlier denial of a new trial. See Nos. 153 and 154, 1944 Term. These returns, taken together with the circumstances surrounding their preparation, show,—what was testified to by Goldstein at the trial and was never in dispute,—that the record title to the Albany Park Bank Building was in the name of his son. The returns were filed at the insistence of revenue agents that the record holder of the title

was bound to return the income from the property, and with a written explanation by Goldstein that record title was in his son, after refusing to sign a statement acknowledging actual ownership. See *supra*, p. 30. From this episode the majority below drew the astonishing conclusion that Goldstein has now "decided to repudiate the contention that the property was Johnson's and claim it for himself" (AR. 219.). In concluding that Goldstein or his son was in truth the beneficial owner of the building, the court below not only gave an altogether perverse significance to the tax returns, but it ignored the fact that the pattern of title was the same in this instance as it was with respect to other properties in which respondent Johnson himself admitted ownership, record title having been taken in the name of Goldstein's nominee. Goldstein acted as agent from the time this building was purchased and would naturally continue so to act at a time when Johnson was not likely to take any action to reflect his ownership. Indeed, the building in question was described by Johnson's counsel in his opening statement at the trial as having been bought by Johnson, either himself or as a partner with someone else, the rents being collected and applied to the maintenance of the building by an agent. See *supra*, pp. 22-24. The evidence disclosed that the agent was Goldstein. These statements of Johnson's counsel, though later argued to be erroneous, were made in Johnson's presence and never corrected during

the trial. Nor was Goldstein himself cross-examined with respect to the Albany Park Bank Building transaction, though he was so cross-examined as to certain other properties and though he remained under subpoena by the defendants for the duration of the trial. (R. 488-489.) The effort, now successful, to attribute ownership of the building to Goldstein or his son, was aptly characterized by the trial court (AR. 166):

In the light of that admission made on the trial, it approaches the absurd and fantastic that courts should now, more than four years later, be considering motions for a new trial on the ground of newly discovered evidence as to the ownership of the building whose ownership was admitted.

It was the filing of tax returns on this property, in the circumstances described, that produced a transformation of the case in the court below.

When we pass from the tax returns and turn to the evidence which had been before both courts on the earlier motion, we find similarly artificial inferences now being drawn. It is not practicable here to examine in detail the evidence which we have attempted to analyze thoroughly in the Statement. Certain items which were regarded by the majority as of major significance may, however, be noted.

What the court below described as "the most remarkable disclosure in this record" (AR. 224) was contained in affidavits of Miss Marsh and

Peacock, asserting that titles to the Bon Air properties and Curran Farm were conveyed by Goldstein's nominees to Johnson, and that Johnson subsequently executed quitclaim deeds of a one-half interest to Skidmore, which were drawn and acknowledged by affiants at Goldstein's request. Aside from the circumstance that these affidavits were before the courts below on the original motion, the facts alleged were before the jury through Johnson's testimony (Nos. 4 and 5, 1944 Term, 3 R. 963-964), and Peacock was under subpoena by respondents at the trial but was not called. These affidavits, far from demonstrating that Goldstein testified falsely, actually support his testimony. The fact that Johnson received full title to Bon Air and Curran Farm from Goldstein's nominees corroborates Goldstein's trial testimony that quitclaim deeds were delivered to Johnson, and also tends to prove the truth of Goldstein's testimony that Johnson gave him the money to purchase the properties. The execution by Johnson of quitclaim deeds to Skidmore of a one-half interest in the properties is cumulative evidence on the issue whether Johnson was the sole owner of Bon Air, an issue which was before the jury on extensive and conflicting evidence, see *supra*, pp. 14-17, and as to which Goldstein was not cross-examined or Peacock called.

A "circumstance alone, unexplained as it is, which comes close to establishing the falsity of

Goldstein's trial testimony" in the view of the majority below (AR 220) was the leasing of the Albany Park Bank Building by Goldstein, as asserted in an affidavit of Sampson. In a statement sharply critical of the trial court's conclusion that this affidavit is not inconsistent with Goldstein's trial testimony, the court below said: "We suppose, according to this reasoning, if Goldstein should lease this property from now until eternity and retain the rents as long as he lives, it would not be inconsistent with his testimony that he purchased this property for and conveyed the title to Johnson." (*Ibid.*) Again the court has overlooked the pattern of arrangements under which Goldstein's nominee took record title to properties in which Johnson admitted having an interest, and the likelihood that Goldstein would continue to act as agent during a period when Johnson would hardly disclose his ownership. Similarly the court below, dealing with the evidence as to escrow deposits (*supra*, pp. 35-36), regarded it as "unbelievable" that "one man's money can be held by another" in pursuance of a tax lien unenforced by the Government (AR. 222). The evidence was not only believable but was in harmony with the facts regarding the Government's lien. (See *supra*, note 11, pp. 32-33.)

The affidavits alleging recantation by Goldstein have been discussed *supra*, pp. 25-28. Their acceptance by the court below on the second appeal, as

against the trial court's reasoned disbelief and acceptance of Goldstein's affidavits, is difficult to explain in terms of the function of the reviewing court. The treatment of the Hess affidavit is illustrative. This affidavit, together with those of Johnson and his brother, recited an interview with Goldstein in Hess's office while Hess was preparing a brief on appeal from the original conviction. The affidavit, said to disclose recantation by Goldstein, was not brought to the attention of any court at that time. The court below stated that it did not think the affidavit of Hess is capable of the construction placed on it by the District Court, namely, that it "could as well be taken to mean that he [Goldstein] was sorry he had testified at all, as it could be taken to mean that he was sorry he had lied". (AR. 213.) The fact is that the trial court was not inventing an ambiguity in Hess's affidavit, but was repeating Hess's own explanation. Hess himself signed a memorandum (R. 247) affirming that he would not say "Whether Goldstein was endeavoring to excuse himself to Johnson for having testified against Johnson, or was conceding falsity" (R. 246; see p. 26, *supra*). When the court below concluded that "any kind of logic or reason of which we are aware requires the acceptance of Hess's version as true and that of Goldstein as false" (AR. 213), it was not merely reversing the trial court on an issue of credibility without adequate foundation, but it

was doing so upon a patent misapprehension of what "Hess's version" was.

2. The majority below declined to apply the established rule that motions for a new trial on the ground of newly discovered evidence will not be granted, where the newly discovered evidence is merely of an impeaching or cumulative character, unless it would probably result in a verdict of acquittal on a new trial.¹⁸ The court instead applied the test of whether evidence subsequently shown to have been perjured may have affected the outcome of the trial already had. This rule has properly found application in cases of recantation by a witness. All the federal cases cited by the majority in support of its position were addressed to that situation. In *Pettine v. Territory of New Mexico*, 201 Fed. 489 (C. C. A. 8), an important witness recanted and asserted that he had been intoxicated at the time of his trial testimony. In *Martin v. United States*, 17 F. 2d 973 (C. C. A. 5), the court referred in dictum to the rule applicable where a witness admits that he testified falsely or that he was mistaken. In *Larison v. United States*, 24 F. 2d 82, a prior decision of the court below, the court denied remand for the purpose of passing on a motion for new trial,

¹⁸ See, e. g., *Weiss v. United States*, 122 F. 2d 675, 691 (C. C. A. 5); *Long v. United States*, 139 F. 2d 652, 654 (C. C. A. 10); *Johnson v. United States*, 32 F. 2d 127, 130 (C. C. A. 8); *Baird v. United States*, 279 Fed. 509, 512 (C. C. A. 6).

but stated the requisites for a new trial in the case of recantation, as in fact that case was. Thus the quotation given by the majority below from that case must be read as applicable to recantation; the standard applicable where the court is "reasonably well satisfied that the testimony given by a material witness is false" (AR. 228) has reference to a recantation followed by a repudiation thereof,— the situation presented in the *Larrison* case itself.¹⁰

The court extended the so-called rule of the *Larrison* case to a case where there has been no recantation, but on the contrary vigorous reassertion of the witness's trial testimony. We should have no quarrel with an extension of that rule to a case where there has been a clear and convincing showing of perjury, found by the trial court. But the majority below, in order to extend the rule regarding new trials for impeaching or cumulative evidence, was obliged to make a preliminary departure from recognized practice in undertaking to review *de novo* the affidavits submitted to the trial court and on that basis reversing the trial court's findings. This is a departure both from

¹⁰ In *State v. Mounkes*, 91 Kans. 653, 138 Pac. 410, the final case cited by the majority below, testimony given by a government witness a few minutes before the close of the case was later shown by conclusive evidence to be false: the fact drawn in issue was whether a school yard contained a flower bed surrounded by stones. The evidence brought forward after the trial showing the existence of that physical fact, by photographs and otherwise, was beyond dispute.

the established precedents and from the purport of Rule 2 (3) of the Criminal Appeals Rules, which contemplates that the trial court, and not the Circuit Court of Appeals, shall be vested with responsibility for determinations of fact on motions for new trial. Indeed, the majority below regarded it as improper for the trial court to avail itself of its impressions of the challenged witness and of the defendant, who had both testified at the trial and who both made affidavits. The majority believed that if such impressions were to be availed of, the trial court should have called for oral testimony by the other affiants, though no request for such testimony was made, and even in reversing there is no remand for that purpose but an outright grant of a new trial.

By virtue of these departures, the court below did not consider what effect the impeaching evidence would have on a new trial. It seems plain enough that the District Court was right in concluding that the result would probably not be altered in the event of a new trial. Cross-examination of Hess (if he were to testify) would reveal, as the present record does, that he could not say that Goldstein had admitted that he testified falsely. Since Hess was present during the entire discussion regarding which respondent Johnson and his brother might testify, a jury would hardly believe Johnson and his brother if they were to state that Goldstein did admit the falsity

of his testimony during this discussion. In the face of this, on a new trial respondents plainly would be forced to employ the tactic they adopted in the trial already had—which was for Johnson to make denials and state that he heard Goldstein “testify to a lot of other things that are not true.” (Nos. 4 and 5, 1942 Term, 3 R. 977.) Fowler and Green could be placed on the stand on a new trial, but their testimony, even if believed despite the circumstances shown by the present record impeaching their credibility, would add little to what was before the jury on the first trial when a Government witness twice testified (*id.*, 2 R. 73, 87) that the defendant Wait (who was acquitted) had stated that part of Goldstein’s testimony was false. None of the hearsay evidence submitted by respondents on their motion would be admissible in evidence. Indeed, the jury could believe that Goldstein’s testimony was partially false and still return verdicts of guilt amply supported by the evidence. As this Court recognized (319 U. S. at 516), the “ownership of gambling houses” theory of proof was the predominant part of the Government’s case, established by a “voluminous body of lurid and tedious testimony,” and independently supports the verdicts. In addition, the proof on that theory would still be corroborated by the “expenditure” theory of proof even if Goldstein’s testimony were disbelieved entirely and even if Johnson’s testimony regarding his

expenditures on these properties were accepted in preference to the Government's other evidence.

3. We are sensible of the obligation of the Government, no less than of the courts, to prevent a miscarriage of justice in a criminal case, particularly where perjury of a witness is charged. For that reason, the Government undertook an investigation in the present case (*supra*, p. 5). We recognize also that motions for a new trial, and the jurisdiction of appellate courts to review orders thereon, are important instruments in preventing injustice. But we are compelled to recognize also that justice may miscarry in different ways, and that motions for a new trial and appellate review thereof may themselves contribute to a frustration of justice. It is doubtless, upon a balance of these considerations that the practice has become established of reposing in the trial court judicial discretion in connection with the granting or denial of new trials, and of limiting appellate review, where no bias is charged to the trial court, to the question whether the court is shown to have abused that discretion. This practice was properly followed on the earlier appeal in the present case. Departure from it on the second appeal has served to demonstrate, it is submitted, the soundness of the practice itself.

Review by this Court is sought to correct such a departure. In exercising its supervisory power, this Court will not be required to assume an undue

burden. The opinions of Judge Barnes and Judge Minton, point the way.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for writs of certiorari should be granted.

HUGH B. COX,
Acting Solicitor General.

JUNE 1945.

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Nos. 115-116

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM R. JOHNSON

THE UNITED STATES OF AMERICA, PETITIONER

v.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P.
KELLY AND STUART SOLOMON BROWN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 115

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM R. JOHNSON

No. 116

THE UNITED STATES OF AMERICA, PETITIONER

v.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P.
KELLY AND STUART SOLOMON BROWN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

PREVIOUS OPINIONS

The majority and dissenting opinions in the
Circuit Court of Appeals on appeal from the
order of the District Court denying respondents

(1)

amended motion for a new trial (AR. 207-236)¹ are reported at 149 F. 2d 31. The memorandum opinion of the District Court denying the amended motion for a new trial (AR. 133-169) is not reported. The prior, unanimous opinion of the court below affirming the District Court's denial of respondents' original motion for a new trial (R. 578-585) is reported at 142 F. 2d 588. The memorandum opinion of the District Court on the original motion (R. 460-516) is not reported. The prior opinions of the Circuit Court of Appeals and of this Court on appeal from respondents' convictions are reported at 123 F. 2d 111 and 319 U. S. 503, respectively.

¹ The printed record in these cases consists of three separately printed records: The original four-volume record in this Court on review of respondents' convictions (Nos. 4 and 5, October Term, 1942); the single-volume record made on respondents' petition for certiorari for review of the judgment of the Circuit Court of Appeals affirming the action of the District Court in denying respondents' subsequently filed motion for a new trial (Nos. 153 and 154, October Term, 1944); and a single-volume record of additional proceedings on respondents' amended motion for a new trial. In granting our petitions for writs of certiorari, the Court also granted our motion to treat and consider the records in Nos. 4 and 5, October Term, 1942, and in Nos. 153 and 154, October Term, 1944, as part of the instant record without reprinting. See *Journal*, October 8, 1945, p. 12. The first record on the motion for a new trial will be referred to by the designation "R." and the record of the additional proceedings on the amended motion by the designation "AR." Reference to the original record on review of respondents' convictions will be shown by explicit reference to the particular volume involved, as 1R., 2R., 3R., and 4R., respectively, Nos. 4 and 5, 1942 Term.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 2, 1945. (AR. 236-237.) The petition for writs of certiorari was filed on June 5, 1945, and was granted October 8, 1945. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Rules 11 and 13 of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the trial court abused its discretion in denying respondents' amended motion for a new trial purportedly based on allegedly newly discovered evidence that a Government witness testified falsely at respondents' trial.

STATEMENT

Respondents' convictions were affirmed by this Court on June 7, 1943. Execution of the Court's judgment has been delayed since that time by proceedings on respondents' subsequently filed original and amended motions for a new trial which purportedly were based on allegedly newly discovered evidence that William Goldstein, a Government witness, testified falsely at the trial. After affirming the action of the trial court in denying respondents' original motion, the Circuit Court of Appeals, with one judge dissent-

ing, has now held that the respondents are entitled to a new trial.

The history of the proceedings and the nature of the review in the court below necessitate a somewhat extended statement of facts.

I

PRIOR PROCEEDINGS

On March 29, 1940, an indictment in five counts was returned against the respondents and others² in the District Court for the Northern District of Illinois. The first four counts charged the defendant Johnson with willful attempts to defeat and evade a large part of his income taxes for the calendar years 1936-1939, inclusive, and charged the other defendants with willfully aiding and abetting Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy. All respondents except Brown were found guilty on all five counts. Brown was found guilty on Counts 3 and 4, the substantive counts for 1938 and 1939, and on Count 5, the conspiracy count. Johnson was sentenced to concurrent sentences totaling five years' imprisonment and a \$10,000 fine. Lesser concurrent sentences were

² The indictment was dismissed as to four defendants prior to trial, three defendants were acquitted by the jury, and the defendant Flanagan died pending review of the judgment of conviction against him. See R. 461, n. 1; *United States v. Johnson*, 319 U. S. 503, 520, n. 1.

imposed on the other respondents. *United States v. Johnson*, 319 U. S. 503, 505-506.

On appeal from the judgments of conviction, the Circuit Court of Appeals reversed principally on the ground that the indictment was returned by an illegally constituted grand jury. *United States v. Johnson*, 123 F. 2d 111 (C. C. A. 7th). This Court reversed the decision of the Circuit Court of Appeals (319 U. S. 503), sustaining the convictions of all respondents.

On June 25, 1943, less than three weeks after this Court affirmed the convictions, counsel for respondent Johnson wrote to the Attorney General, charging that William Goldstein, a Government witness, had committed perjury, and submitting affidavits intended to prove the charge of perjury. (R. 60-80, 159.) An extensive investigation was thereupon conducted by the Government, the results of which demonstrated that Goldstein had not testified falsely at the trial. (See letter written by the Solicitor General, as Acting Attorney General, to respondents' counsel on September 13, 1943, R. 265-266.)

In the meantime respondents took steps to and subsequently did obtain a remand of the case to the trial court for the filing of a motion for a new trial. (R. 9-10.) The motion (R. 13-17), filed on October 29, 1943, with leave of the trial court (R. 12), purported to be based on allegedly newly discovered evidence that Goldstein had testified falsely at respondents' trial. Numerous affidavits

were submitted in support of the motion (R. 81-242) and others were filed later (R. 336-338). Respondents also submitted a brief in support of the motion (R. 17-55) and the Government filed an answer (R. 55-58), a brief in opposition (R. 280-314), and a number of affidavits (R. 243-279, 315-316, 339-453). A hearing on the motion was had on November 15, 1943 (R. 454), before Judge Barnes (see R. 534-536), who had presided at the respondents' trial (Nos. 4 and 5, 1942 Term, 1 R. 1). The trial court filed a comprehensive opinion on December 28, 1943 (R. 460-516) and three days later entered an order denying the motion (R. 534-536).

On appeal the Circuit Court of Appeals unanimously affirmed the order of the trial court. (*United States v. Johnson*, 142 F. 2d 588 (C. C. A. 7th); R. 578-586.) In doing so the court stated that it had "carefully considered the record before us and the action of the trial court" (R. 583), that it could not say "that the so-called newly discovered evidence inevitably leads to the conclusion that Goldstein had testified falsely" (R. 584) and that the trial court had not abused its discretion in denying the motion (R. 583, 584, 585).

Respondents then filed a petition for certiorari (Nos. 153 and 154, 1944 Term), which the Government opposed. Shortly before the convening of the 1944 term of this Court and while the petition for certiorari was pending, counsel for respondents requested the Government to in-

form the Court that Theodore Goldstein, William Goldstein's son, had recently filed income tax returns covering the rentals from the Albany Park Bank Building. In line with his testimony with respect to other properties, William Goldstein had testified that he purchased the Albany Park Bank Building at respondent Johnson's request with money furnished by Johnson and took title in the name of his son Theodore, and that subsequently a quitclaim deed on the building was delivered to Johnson. (Nos. 4 and 5, 1942 Term, 2 R. 56-57; see also Appendix A, *infra*, pp. 120-121.)

Through a prompt investigation conducted by the Bureau of Internal Revenue, the Government verified the fact that amended and delinquent income tax returns on the Albany Park Bank Building had recently been filed by Theodore Goldstein, and also learned of the extraordinary circumstances under which they were filed. The investigation disclosed that the Chicago office of the Bureau of Internal Revenue received an anonymous telephone call in 1944 to the effect that the income from the Albany Park Bank Building was not being reported and that rents therefrom were supposedly being paid to William Goldstein who claimed that he was agent for his son, Theodore Goldstein; that a zone deputy collector interviewed William Goldstein a number of times thereafter, insisting that Theodore was liable for taxes on the income from the building; that Goldstein protested, repeatedly asserting that his son

was merely the record title owner, not the actual owner; and that after further persistent efforts by the deputy collector and his superior, Goldstein finally agreed to the filing of the returns by his son, which were prepared by the deputy collector, in order that the matter might be closed.

Although the Government felt that the filing of these returns was not inconsistent with Goldstein's testimony at the trial, and that the circumstances under which they were filed were such as to dissipate any relevance the returns might otherwise have had, the Government nevertheless acceded to respondents' request. In a supplemental memorandum we informed this Court of the filing of the returns and of the circumstances under which they were filed. On motion of the present respondents, the Court deferred consideration of the petition for certiorari conditioned upon the prompt filing in the Circuit Court of Appeals of a motion to reopen the proceedings on the motion for new trial and until the disposition of the motion by the Circuit Court of Appeals. (AR. 20-21.) This resulted in the second remand to the trial court (AR. 18-19) and dismissal of the petition for certiorari. 323 U. S. 806.

Pursuant to motion of the respondents (AR. 23-25), the trial court ordered the production of the income tax returns filed by Theodore Goldstein (AR. 26-27). Respondents then filed an amended motion for a new trial (AR. 27-36),

relying primarily on the filing of the returns by Theodore Goldstein to show that William Goldstein testified falsely at the trial. The Government filed an answer together with several affidavits which showed the circumstances under which the returns were filed. (See AR. 87-112.) Respondents filed a reply (AR. 112-132) and the hearing on the motion, held on December 11, 1944, was again before Judge Barnes, the trial judge (AR. 133). On December 15, 1944, Judge Barnes filed an opinion in which he reviewed the history of the proceedings in the case (AR. 133-169) and again entered an order denying the motion for a new trial (AR. 171-173).

On this appeal, the majority of the Circuit Court of Appeals (Major, C. J., and Sparks, C. J.) held that the trial court had abused its discretion in denying the motion, basing its opinion primarily on the evidence submitted on the original motion. (AR. 207-230.) Judge Minton dissented, stating, among other things, that the additional evidence adduced in support of the motion added nothing to the proof that was submitted to the court on the original motion when the court, through the same three judges, had, after having "carefully considered the record" (R. 583), affirmed the action of the trial court in denying the motion (AR. 230-236). It is this action of the majority in granting respondents a new trial which is now before this Court for review.

II

TRIAL BACKGROUND OF CASE

A

Theory of prosecution—"Ownership of gambling houses" and "expenditure" theories of proof

The trial theory of the prosecution was that respondent Johnson was the proprietor of a number of gambling houses in and around Chicago from which he derived large amounts of unreported income, and that other defendants posed as the owners, thereby concealing Johnson's interest and aiding and abetting Johnson in his attempts at income tax evasion. The Government undertook to show that the various gambling houses, although ostensibly separately owned, were actually operated as a unit, thus indicating central control and ownership, and that Johnson was so identified with the gambling houses as to prove that he was the true owner. Considerable evidence was also introduced to show the magnitude of the operations of these houses, including their currency exchange transactions which reflected income to Johnson in excess of the amounts he reported in his income tax returns. The evidence on this aspect of the case has been referred to throughout the proceedings as relating to the "ownership" theory of proof. The testimony of Goldstein, alleged by respondents to have been false, had little bearing on this branch of the case, which turned on the issue of the proprietorship of gambling houses.

The Government went still further in proving its case. Evidence was introduced under what was termed the "expenditure" theory of proof, designed to substantiate the conclusion that Johnson had unreported income by showing that his cash expenditures during the periods covered by the indictment were in excess of his available declared cash resources, including his reported income. The showing on some of these expenditures was made initially through the testimony of Goldstein. Thus, among those expenditures was the purchase of the Albany Park Bank Building for some \$59,000. Goldstein testified that he purchased the building at Johnson's request with funds supplied by Johnson, that he took title in the name of his son "Ted", and that a quitclaim deed was thereafter delivered to Johnson. (2 R. 56-57, Nos. 4 and 5, 1942 Term; Appendix A, *infra*, pp. 120-121)

While each of these two theories of proof substantiated the other, as urged in the Government's Brief on Reargument in Nos. 4 and 5, 1942 Term, pp. 5-6, which contains a detailed summary of all the evidence, the Government's case rested predominantly upon the "ownership" theory of proof, the "central issue" and "only real problem before the jury," as this Court stated (319 U. S. at 516), being whether Johnson had a financial interest in the gambling clubs operated by the other defendants.³ In

³ The convictions of Johnson's co-defendants were necessarily, at least in part, predicated upon the "ownership"

passing on the sufficiency of the evidence, this Court stated (319 U. S. at 516-517, 518) that the evidence "amply justified" the jury in finding that the gambling houses were under a single domination and that Johnson owned a proprietary interest in the network of gambling houses; that the jury, having been justified in finding that the individual defendants were screens behind which Johnson operated, was also justified by "solid proof" in finding that there were winnings from these houses on which Johnson attempted to evade income tax payments. Moreover, advert- ing to the "expenditure" theory of proof, the Court stated that the conclusion that Johnson had large, unreported income was "reinforced" by proof that, certainly for the years 1937, 1938 and 1939, Johnson's expenditures exceeded his available declared resources. (*Id.*, at 517.) Goldstein's testimony was concerned primarily with some of those expenditures and had at most only a relatively minor bearing on Johnson's own- ership of and the computation of the unreported income from the gambling establishments.

B

Goldstein's testimony

The testimony of Goldstein, contained in the trial record (2 R. 55-68, Nos. 4 and 5, 1942 theory of proof, for, as this Court indicated in its opinion (319 U. S. at 518), they were guilty of aiding and abetting Johnson's attempts at income tax evasion only if they con- sciously were parties to the concealment of Johnson's interest in the gambling clubs of which they pretended to be proprietors.

Term) is reproduced at pages 118-137, *infra*, as Appendix A to this brief.

Briefly, Goldstein was shown certain escrow agreements, later introduced in evidence, which revealed the details of the purchase of several properties and of two escrow deposits on unconsummated sales. The details disclosed the fact that Goldstein was the purchaser and that, as to all of the purchased properties except one (Sunny Acres Farm), title had been taken in someone else's name, e. g., his law partner Isadore Goldstein, or his son Theodore, or one of his stenographers. In addition to such facts disclosed by the foregoing documents, Goldstein testified to the following three facts with respect to each item: (a) That he made payment in currency; (b) that the money was given to him by respondent Johnson with the request that he make the purchase or escrow deposit, as the case might be; and (c) that a quitclaim deed was subsequently delivered to Johnson, except in the case of the two escrows involving unconsummated sales. The properties and amounts involved were as follows:

Sunny Acres Farm, consisting of two parcels, one of Sunny Acres and one of adjoining Du Page County real estate, purchased separately, \$161,500 (2 R. 59-60, Nos. 4 and 5, 1942 Term);

2730 So. Western Avenue, \$13,115 (*id.* 55-56);

The Dells, \$19,000 (*id.* 59);

Albany Park Bank Building, \$59,887.05 (*id.* 56-57); and

Bon Air Country Club and adjacent properties, which included the Bon Air Country Club, \$75,000, the Curran Farm, \$63,800, the Green House, \$8,500, the White House, \$8,000, and a gas station, \$4,000, all purchased separately—total \$169,300 (*id.* 57-59).

The two escrow deposits were in the amounts of \$10,000 and \$7,500, the \$10,000 deposit being made on property lying between Bon Air and the Curran Farm.

When questioned on cross-examination regarding the property at 9730 So. Western Avenue, Goldstein stated that he did not know whether Johnson got full title to the property and was not sure whether anyone else was interested in it. (Appendix A, *infra*, p. 131.) After being shown the deeds to Johnson, he recollected that Johnson received an undivided one-half interest by conveyance from Ann Homan and her husband, who got title through Isadore Goldstein, Goldstein's nominee, and stated that, as he remembered, Skidmore got the other half. (*Id.*, p. 133.) He reiterated, however, that he was positive it was Johnson who gave him the money to make the purchase. (*Id.*, p. 134.) As to The Dells property, Goldstein testified on cross-examination that "I don't know, but that may be so, that Mr. Johnson only owns half of the Dells property and only paid half of the price." (*Id.*, p. 135.)

Goldstein was not cross-examined at all with respect to any of the other properties or either of the two escrows. The reason given was that respondents had no further information bearing on the other matters regarding which Goldstein had testified. (*Id.*, p. 137.) The failure to cross-examine Goldstein with respect to Bon Air is especially significant, because when Johnson later took the witness stand he asserted he had only a one-half interest in the various Bon Air properties (as well as in 9730 So. Western Avenue and The Dells) and attempted to explain away the fact that Goldstein had quitclaimed full title to him by stating that Skidmore had purchased the properties in his, Johnson's, name. (See *infra*, p. 32.) Although Goldstein was kept under subpoena by respondents until the close of the trial six weeks later, no attempt was made to call him for further testimony. (R. 488-489.)

Like some of the witnesses who testified for the Government in connection with the "ownership" theory of proof (319 U. S. at 516), Goldstein was a reluctant and "obviously unwilling" witness. As he testified on cross-examination, he had been indicted along with Johnson and the other defendants. (2 R. 65, Nos. 4 and 5, 1942 Term.) And although that indictment had been dismissed as to him before trial,⁴ he was still

⁴ The indictment, in addition to being dismissed as to Goldstein and Skidmore, was dismissed as to Orrie Alexander and Bernice Downey. (Nos. 4 and 5, 1942 Term, 3 R. 1010.)

under indictment for perjury in another connection, as he also testified on cross-examination. (*Ibid.*) No doubt these factors induced Goldstein to be "quite circumspect" in testifying, as the trial judge states he was. (AR. 168.) Goldstein's credibility was sharply in issue at the trial. The foregoing facts were all before the jury and the "truth" of his testimony was squarely challenged. (3 R. 977, Nos. 4 and 5, 1942 Term; see also 2 R. 87.)

C

Corroboration of Goldstein's testimony

Goldstein's testimony was in large part corroborated by the trial record or not disputed. Respondent Johnson himself corroborated Goldstein's entire testimony with respect to the purchase of the Sunny Acres Farm and adjoining Du Page County real estate, admitting that he was the sole owner of the two pieces of property. (Nos. 4 and 5, 1942 Term, 3 R. 982-983.) Title to the adjoining Du Page County property, like the titles to the other properties as to which Goldstein testified, had been taken in the name of a nominee, and a quitclaim deed subsequently delivered to Johnson. (*Id.*, 2 R. 60.) Goldstein's testimony that he used currency for the escrow deposits and purchases of the other properties as to which he testified (9730 So. Western Avenue, The Dells, Albany Park Bank Building, and Bon

Air) has never been disputed.⁵ As to the delivery of deeds to these properties, Johnson admitted that Goldstein had delivered the deeds to him for full title to the Bon Air properties, including the Curran Farm (*id.*, 3 R. 973-974), and that Goldstein had handled the purchase of the property at 9730 So. Western Avenue and delivered deeds to him on that property (*id.*, 3 R. 974), the deeds being of a one-half interest, as Goldstein had testified and as the deeds, introduced in evidence, showed (*id.*, 2 R. 64). Johnson admitted that he owned a one-half interest in The Dells (*id.*, 3 R. 955, 977), from which it may be inferred that he received a deed for at least the one-half interest Goldstein unequivocally testified he had. Thus, the trial record incontrovertibly establishes that a substantial part of Goldstein's testimony was true. The remainder of his testimony—that regarding the purchase of the Albany Park Bank Building and as to Johnson's giving him the money to make the purchases of 9730 So. Western Avenue, The Dells, and Bon Air—was also corroborated.

Goldstein's testimony in connection with the purchase of the Albany Park Bank Building was corroborated at the beginning of the trial by an admission which Johnson's counsel, Mr. Thompson,

⁵ For corroboration of his testimony as to payment in currency, see, e. g., Nos. 4 and 5, 1942 Term, 3 R. 574-575, as to purchase of Bon Air Country Club property; *id.*, 3 R. 926-927, as to purchase of The Dells; *id.*, 3 R. 575-576, as to the \$7,500 escrow deposit.

made in his opening statement in the presence of respondent Johnson. At that time Johnson's counsel stated (*id.*, 2 R. 3-4):

We will prove that Mr. Johnson had absolutely nothing to do with this currency exchange [located in the building], had no interest in it whatever, he never cashed a check there, he never exchanged money there, he never bought a money order there, he never received a dime of income from the place.

Mr. Johnson owned either the building or an interest in the building. It was an old bank building that went broke when banks went broke in this town. It was put on the market to be sold by the receiver. Mr. Johnson either by himself or as partner with somebody bought this building as an investment. It was there being operated. The safety deposit boxes were being rented and operated for the convenience of the people in the neighborhood and for others.

We will prove that there was a woman there in charge of these safety deposit boxes and as Mr. Brown's attorney, Mr. Hess, has said, that this building was rented by the currency exchange for fifty dollars a month, I think it was. *The money was going to the agent who had charge of the building and being spent for any expenses to maintain the building. Mr. Johnson got no income from this building at all, but Mr. Johnson did own the building, * * ** [Italics supplied.]

The agent referred to was Goldstein (see *infra*, p. 28), a fact which will be seen to explain many of his subsequent actions with respect to the building—actions now relied upon by respondents as showing the falsity of his testimony. At the moment it is sufficient to note that this quoted statement by Johnson's counsel reflected an accurate knowledge of the history of the building and its operation, as the evidence later disclosed, and that the assertion that Johnson owned the building was never retracted during the trial, although Johnson, when he took the stand toward the end of the trial and denied practically all of the damaging evidence against him, also denied having given Goldstein the money to purchase, or of having any interest in, the building.*

Goldstein's testimony that Johnson gave him the money to purchase these properties also has substantial corroboration in the trial record. As

* When the case was in the Circuit Court of Appeals, Johnson's trial counsel stated in a reply brief that he was employed by Johnson the day before the case was called to trial and made his opening statement to the jury on the second day of the trial, that he undertook to get the complicated story in his mind in the few hours available, that he was in error in stating that Johnson had an interest in the building but that as the trial progressed he forgot about it and did not ask to make a correction after he learned the fact. (R. 334, note.) As already stated, however, counsel's description of the property was an accurate one. Moreover, counsel's admission, so unequivocally stated and repeated several times, was particularly significant since it was based upon information that he had so recently received from Johnson and before too long a time had elapsed within which to plan the strategy for the defense.

already stated, the Du Page County real estate, which Johnson admitted Goldstein purchased for him, was purchased in the same manner as 9730 So. Western Avenue, The Dells, the Albany Park Bank Building and Bon Air, that is, with currency and with title being taken in the name of a nominee and a quitclaim deed subsequently being delivered to Johnson. Johnson's admission that Goldstein delivered deeds of full title to him for the Bon Air properties warrants the inference that Johnson gave Goldstein the money to make the purchases of the various parcels of which Bon Air was constituted, irrespective of whether Johnson may later have quitclaimed a one-half interest to Skidmore. Johnson's admission that it was planned that a gambling room would be run at Bon Air (*id.*, 3 R. 968-969) is significant in view of the fact that the "ownership" theory of proof showed Johnson to have been the proprietor of a string of gambling houses. Johnson's admission that he had a one-half interest in 9730 So. Western Avenue, The Dells and Bon Air (*id.*, 3 R. 960, 973, 977, 982, 983) made it as likely as not that he had been the one to give Goldstein the money to purchase the properties. All of the purchases were made in currency and Johnson was the one person shown by the record to transact his business in cash, admitting that he habitually carried \$12,000 to \$15,000 in cash in his pockets. (*Id.*, 3 R. 965, 976, 985-986.) Further, although Johnson denied at the trial that Goldstein had purchased any of

these properties for him (except the Sunny Acres Farm and adjoining Du Page County real estate), in November of 1939 Johnson told revenue agents that Goldstein had bought the property at 9730 So. Western Avenue for him (*id.*, 2 R. 118), that he owned that property and also Bon Air (*ibid*; *id.*, 4 R. 8) and, when asked about the cost of the properties, referred the agents to Goldstein (*id.*, 4 R. 8).

D

Expenditure theory of proof and, so far as pertinent here, the evidence adduced in connection with it

While respondents' motions for a new trial were purportedly based on the ground that Goldstein testified falsely at their trial, the motion evidence for the most part is cumulative of that adduced at the trial on issues which were before the jury on conflicting evidence, the motion evidence being designed to disprove conclusions which the jury might have drawn. Accordingly, it may be helpful to explain those issues in detail, to state the trial evidence relating to them, and to show, at the same time, the connection of Goldstein's testimony.

As already stated, Goldstein's testimony was a part of the "expenditure" theory of proof, which was designed to show that respondent Johnson's expenditures during the years involved exceeded his available declared cash resources, including his reported income. This theory of proof neces-

sarily required a computation of Johnson's expenditures and available declared cash resources for the benefit of the jury. At the end of the Government's case in chief, the Government submitted such a computation through the testimony of expert witness Clifford, who had prepared it. The computation showed the total of the excess of Johnson's expenditures over his available declared cash resources to be \$474,349.54 (Nos. 4 and 5, 1942 Term, 4 R. 15), but the jury was of course advised that this was on the basis of the Government's evidence. Later, when Johnson took the witness stand, he admitted additional assets or expenditures, not described as such, of approximately \$200,000. (R. 23.) In our Brief on Reargument in Nos. 4 and 5, 1942 Term, these additional expenditures were reflected in the computation we submitted to this Court (which is for convenience reprinted as Appendix B and attached to the inside of the back cover of this brief), with the result that, after certain adjustments were made on some of the other items, the computation, on the basis of the Government's evidence, reflected a total of \$640,387.86 as the excess of Johnson's expenditures over his available declared cash resources.

At the end of the trial, respondents, through the testimony of their expert witness Sullivan (*id.*, 3 R. 991-995), submitted a computation based on their evidence which showed the total of Johnson's expenditures over his available declared

cash resources to be \$432,310.30 less than the Government's figure. (*id.*, 3 R. 992). This figure, which did not take into account the additional expenditures or assets admitted by Johnson, left a total excess of some \$42,000. Thus, with the additional expenditures or assets admitted by Johnson, there was an excess of some \$240,000 even according to respondents' computations.

The difference between the Government's computation and that of respondents resulted principally from a conflict in the evidence as to whether Johnson made all of the expenditures with respect to the Bon Air properties, including the Curran Farm, or only one-half thereof. The Government's evidence in this connection is summarized below (*infra*, pp. 25-34) and, it may be noted at this point, consisted of a great deal more than Goldstein's testimony. Indeed, Goldstein's testimony related only to the original purchase; he did not testify as to the improvement expenditures of some \$548,000. (See Exhibit B, *infra*.) As will be seen, the great bulk of the allegedly newly discovered evidence submitted by respondents on their motions for a new trial is designed to prove that Skidmore had an interest in Bon Air and that Johnson therefore was not the sole owner. However, the crucial issue on the question of Johnson's expenditures was whether he in fact made the expenditures involved and not whether Skidmore may have emerged with an interest in the properties thereafter. Goldstein's

testimony was strictly and carefully limited to the outlays initially made by Johnson in the purchase of these properties.

Part of the remaining difference between the computation of the Government and that of respondents resulted from a difference in the expenditure charges for the property at 9730 So. Western Avenue, The Dells and the Albany Park Bank Building, as to which Goldstein had testified. The Government's computation charged Johnson with the full purchase price of those properties and with the full cost of a building on the property at 9730 So. Western Avenue. In accordance with Johnson's testimony, respondents' computation omitted the purchase price of the Albany Park Bank Building and charged Johnson only with one-half of the purchase price of the other properties and with one-half of the cost of the building at 9730 So. Western Avenue. (*Id.*, 3 R. 992-993.) The total difference in respect of these expenditure charges was only approximately \$85,500.

Whether Johnson had made the disputed expenditures was of course an issue for the jury to resolve on the conflicting evidence. This evidence, which was recited in our Brief on Re-argument in Nos. 4 and 5, 1942 Term, pages 100-108, will be set forth below, in the same manner except for minor variations, together with the amount *in dispute* as to each property. This evidence relates only to the propriety of charging

Johnson with the amounts specified, since the amounts themselves were established by other evidence, the purchase prices of the properties, for instance, by the escrow agreements which were introduced in evidence as exhibits. Johnson's corroboration of Goldstein's testimony regarding the purchase of the Du Page County real estate, for which payment was made in currency and as to which title was taken in the name of a nominee and a quitclaim deed subsequently delivered to Johnson, evidence which is not mentioned below but which might have been considered by the jury as to all of the properties, since they were purchased in the same manner.

9730 So. Western Avenue (amount in dispute, \$17,757.50, representing one-half the cost of the land and the building placed on it).—Goldstein testified that he purchased the real estate comprising this property; a number of vacant lots, in 1937, that he purchased the various lots at Johnson's request and received the amounts of the payments from Johnson in currency, that title to the parcels was variously taken in the names of his law partner or his secretary and that subsequently quitclaim deeds were delivered to Johnson. (Appendix A, *infra*, pp. 118-120.) On cross-examination Goldstein stated that a deed for one-half of the property was made to William R. Skidmore, but that he was positive it was Johnson who had given him the money to make the purchase. (Appendix A, *infra*, pp. 133-134.)

A building was constructed on the property in 1937. The supervising architect, Nadherny, who was called as the court's witness, testified that he was working for Skidmore when Skidmore told him he had a friend [Johnson] who wanted to put up a building. Johnson explained to the architect the type of building desired and ordered the preparation of plans. Nadherny stated that he received the money which he paid out for the construction of the building in part from Skidmore and in part from Johnson but said that he felt the payments were being made by Skidmore in Johnson's behalf, "like an agency." (Nos. 4 and 5, 1942 Term, 2 R. 74, 75, 79, 83-84, 85, 88-89.)

Two revenue agents related a conversation which they had with Johnson in November of 1939. Both stated that Johnson told them he was the owner of 9730 So. Western Avenue. (*Id.*, 2 R. 117-118, 4 R. 8.) One testified that Johnson said nothing as to whether Skidmore had an interest in the property although he had asked him. (*Id.*, 2 R. 118.) In a formal statement given by Johnson on March 27, 1939, and introduced in evidence, Johnson stated that he had had no business transactions with Skidmore, except a loan he had made to Skidmore. (*Id.*, 2 R. 411.)

Respondent Johnson testified that he owned one-half of the property at 9730 So. Western Avenue and that he had contributed to the purchase of the land and cost of the building subse-

quently built on it. He denied that he ever told the agents he was the sole owner and stated he told them he was part owner. (*Id.*, 3 R. 955, 959.)

On cross-examination he stated that he bought the property at Skidmore's suggestion and paid one-half of the purchase price to Skidmore and that the two of them decided to build the building and he paid one-half of the cost. (*Id.*, 3 R. 973-975.)

The Dells, (amount in dispute, \$11,057.95 representing one-half the cost of the property).—Goldstein testified that he purchased the two parcels comprising this property at Johnson's request, that he received the purchase money from Johnson in currency, and that he delivered quitclaim deeds to the property to Johnson. (Appendix A, *infra*, pp. 123-124.) On cross-examination he stated that he did not remember whether Skidmore owned half of the property, that he was of the opinion that Johnson owned it all, but that "that may be so, that Mr. Johnson only owns half of the Dells property and only paid half of the price." (Appendix A, *infra*, p. 135.)

Johnson testified that he owned only a one-half interest in The Dells and that he paid Skidmore for that one-half interest. He denied that he had made any arrangements with Goldstein for its purchase. (Nos. 4 and 5, 1942 Term, 3 R. 955, 970-971.) An attorney, testifying for the defense, stated that he represented the sellers of The Dells and carried on negotiations with Goldstein for the sale. He said that he talked to Skid-

more about the purchase, and obtained Skidmore's approval as to the price. He further said that he never saw Johnson in connection with the transaction. He admitted that Goldstein paid him the purchase money at later dates. (*Id.*, 3 R. 926-927.)

Albany Park Bank Building (\$59,887.05 for purchase of property).—Goldstein testified that he purchased this building on July 16, 1937, at the request of Johnson, that he received the amounts of the original deposit and final payment in currency from Johnson, that title to the property was taken in the name of his son, Ted W. Goldstein (as in the case of the Bon Air Country Club and adjacent houses), and that a quitclaim deed was subsequently delivered to Johnson by his son. (Appendix A, *infra*, pp. 120-121.) The Lawrence Avenue Currency Exchange, operated by the respondent Brown and in which the Business of Johnson's gambling houses was carried as a single account,⁷ was located in this building after July 1938. (Nos. 4 and 5, 1942 Term, 3 R. 587.) Two employees at the building testified that Goldstein reemployed them and became the spokesman for the building in July, 1937. (*Id.*, 3 R. 587, 590, 595, 599.)

Johnson denied that he owned any part of the building and stated he had not employed Goldstein

⁷ See our Brief on Reargument in Nos. 4 and 5, 1942 Term, pp. 29-30, 55-64.

to purchase it, had never given Goldstein money to purchase it, and that no deed to it had ever been given him. (*Id.*, 3 R. 955.) However, this testimony must be considered in relation to the admission of Johnson's counsel (*supra*, pp. 18-19), made in his opening statement and never retracted during the trial, that Johnson owned the building, having either purchased it himself or as a partner with someone.

Bon Air Country Club and adjacent properties (including the Curran Farm) (amount in dispute, approximately \$353,000, representing one-half the cost of the properties and improvements).—Goldstein testified that he made the purchase of these various properties at Johnson's request, that he received the money for the purchase payments from Johnson in currency, that he took title to the properties in the names of nominees (the nominee for the Bon Air Country Club and two adjoining houses being his son, Theodore Goldstein, as in the case of the Albany Park Bank Building), and that quitclaim deeds were subsequently delivered to Johnson. (Appendix A, *infra*, pp. 121-123.) Goldstein's testimony dealt only with the expenditures for the purchase of these properties, and not with any of the extensive improvements. His testimony showed an aggregate expenditure of \$169,300 for these properties (see p. 14, *supra*), and since Johnson does not dispute one-half ownership, only one-half thereof, or \$84,650 is in dispute.

An officer of the bank which sold the country club property testified that he negotiated the sale with Goldstein and received payment in currency from him. The witness said that he met no principal other than Goldstein and that he had no contact or dealings with any other person than Goldstein. (*Id.*, 3 R. 574-575.)

Johnson admitted that Goldstein had delivered the deeds to him and that title to the property stood in his, Johnson's, name, although, among other things, Johnson stated that he signed a quit-claim deed to Skidmore for a one-half interest. (*Id.*, 3 R. 963-965.)

The country club property was operated as a night club during 1938 and 1939 by a corporation known as the Bon-Air Catering Company, Inc. (*Id.*, 2 R. 48; 3 R. 896-897, 956.) Fifty-four shares of the corporation's capital stock were registered in the name of and held by Johnson, twenty-four shares by the defendant Wait, twenty shares by the respondent Hartigan, and one share each by two employees.* (*Id.*, 2 R. 55; 3 R. 775, 912, 964.) An accountant employed by the accounting firm which prepared and audited the corporation books testified that in the fall of 1939 he asked Johnson for details as to the payment of the various amounts of stock and that Johnson in-

* Some time after the formation of the company one of the employees died, and his share was transferred to Johnson, thereby increasing Johnson's holdings to fifty-five shares. (Nos. 4 and 5, 1942 Term, 3 R. 912, 956, 964.)

structed him to charge all of the amount to his (Johnson's) account. This entry was made by the accountant in the corporation's books. (*Id.*, 3 R. 775-776.)

Large expenditures for improvements on the Bon Air property during 1938 and some in 1939 were entered as assets on the Catering Company's books. These amounts were variously credited to Johnson, Wait, one Geary and Roy Love. An accountant for the auditing company stated that he discussed these charges with Johnson in 1939 and that Johnson told him that all of these items had been advanced by him and should be credited to him rather than scattered among the four accounts. The accountant was likewise instructed by Johnson that these should never have been on the corporation's books and should be taken off. Accordingly, he took the asset accounts off the corporation books and merged the small credit remaining in Johnson's account. (*Id.*, 2 R. 53-54.)

Skidmore's name did not appear on any of the Bon Air records. (*Id.*, 3 R. 982.)

Although Johnson said he and Skidmore were partners, they did not file a partnership income tax return. (*Id.*, 3 R. 983.)

In November 1939 Johnson told revenue agents that he owned the Bon Air Country Club and did not mention that Skidmore had any interest in the property. (*Id.*, 2 R. 117-118; 4 R. 8.) In his statement of March 1939, Johnson had said that

he had had no business transactions with Skidmore. (*Id.*, 2 R. 411.)

Johnson testified that he owned one-half of the Bon Air properties and that Skidmore owned the other half. He denied that he had anything to do with the negotiations for the purchase of the property and that he ever gave Goldstein money to pay for the property. He stated that Skidmore purchased the property and took title in Johnson's name because he did not want title in his own name; that he, Johnson, later contributed his one-half of the price; and that each of them thereafter contributed equally to the expenditures for improvements and operations. (*Id.*, 3 R. 955-957, 961-965, 967-970, 979, 982, 983-984.) Johnson denied that he had told the revenue agents he was the sole owner of Bon Air and said that he told them he was part owner. (*Id.*, 3 R. 959, 963.) He explained his statement about never having business transactions with Skidmore by saying that the conversation related to gambling and that he thought the question asked related to gambling transactions. (*Id.*, 3 R. 963.)

The defendant Wait gave similar testimony as to the ownership of Bon Air. (*Id.*, 3 R. 896-898, 900, 910-913.)

The defense also introduced miscellaneous other evidence for the purpose of attempting to prove that Skidmore had an interest in Bon Air. The

witness Hare stated that he had acted for Skidmore in negotiations with the bondholders with respect to the purchase of Bon Air and later took Goldstein to Becker, who represented the seller, to discuss the deal. (*Id.*, 3 R. 914-915.) Becker, with whom the deal was made, testified that Goldstein conducted the negotiations and that he received a letter from Goldstein, introduced in evidence (Def. Ex. J-6), in which Goldstein stated he was representing "clients." (*Id.*, 3 R. 574-575.) An alleged agent for the seller stated that Goldstein told him that before the deal was closed he would have to see "a couple of other people." (*Id.*, 3 R. 576.) Nadherny, a court witness, testified that part of his architect's fee was paid by Skidmore and part by Johnson. (*Id.*, 2 R. 81.) Another witness stated that Skidmore paid for some electrical work at Bon Air. (*Id.*, 3 R. 916-917.) A wholesale grocery company was shown to have "Skidmore and Johnson, Bon Air Country Club, Wheeling, Illinois" on its ledger cards (*id.*, 3 R. 919-920, 1037), while the invoices of a refining company were addressed to "Bon Air Country Club, W. R. Skidmore, Wheeling, Illinois" (*id.*, 3 R. 930, 1037). Two persons who were employed at Bon Air testified that both Skidmore and Johnson participated in its management. (*Id.*, 3 R. 893-894, 923.) Four other witnesses recited instances of acts by Skidmore indicating that he was connected with the management or operation

of the property. (*Id.*, 3 R. 916, 922, 925, 928.) Certificates of title to trucks owned by the Bon Air Country Club were shown to bear Skidmore's signature. (*Id.*, 3 R. 956.)

Two escrows (one of \$10,000 and one of \$7,500.)—Goldstein testified that he entered into the escrow agreements and made the deposits with currency he received from Johnson. The \$10,000 escrow involved acreage located between the Curran Farm and the Bon Air property. (Appendix A, *infra*, p. 126; see also Nos. 4 and 5, 1942 Term, 3 R. 575-576.)

Johnson stated that he did not furnish Goldstein with the money for these deposits and knew nothing of the transactions. (*Id.*, 3 R. 957.)

III

ALLEGEDLY NEWLY DISCOVERED EVIDENCE ADDUCED ON MOTIONS FOR NEW TRIAL

The evidence which respondents relied upon in support of their motions for a new trial may be classified into three groups, as follows: (1) Evidence of alleged admissions by Goldstein of the falsity of his testimony; (2) statements and conduct by Goldstein allegedly inconsistent with his trial testimony; and (3) evidence which is either hearsay or merely cumulative of similar evidence introduced at the trial on the issue whether Johnson was the sole owner of some of these purchased properties.

A

Evidence of alleged admissions by Goldstein of the falsity of his testimony

Affidavits by Hess, respondent Johnson, and Johnson's brother.—Respondents presented the affidavits of Hess, counsel for Johnson's co-defendants at the trial; respondent Johnson; and Johnson's brother, John E. Johnson, an attorney. These affidavits all describe a supposedly accidental meeting in Hess' office between Hess, Goldstein and the two Johnsons which took place some time during the period February to April, 1941, when Hess was writing his brief on appeal from respondents' convictions. (R. 126, 221, 233, 245.) All three affidavits contain almost identical language, such as that Johnson said to Goldstein "Why did you lie?" and that Goldstein replied in substance that he was "sorry" that he did. (R. 126-127, 221-222, 234.)

The Hess affidavit states that respondent Johnson inquired "of Goldstein as to why he testified that 'he bought those properties for me when you know you bought them for Skidmore. Why did you lie?' Goldstein replied in substance that he was sorry that he did but that he was a victim of circumstances and stated that he preferred not to discuss the matter." (R. 127.) It is evident that this affidavit is artfully worded so that it could be read to mean that Goldstein said he was sorry he *testified*, or that he was sorry he *lied*. In an effort to clarify that ambiguity, a Govern-

ment investigator, Special Agent Read, interviewed Hess, and prepared a memorandum setting forth the substance of the interview. Hess signed that memorandum stating that "it agrees with my recollection of the discussion referred to" (R. 247), and the memorandum contains the following crucial passage (R. 246):

With respect to the statement in Affidavit No. 19, "Goldstein replied in substance that he was sorry that he did." Mr. Hess informed me that he is unable to clarify this statement since that is his best recollection of what was said. Whether Goldstein was endeavoring to excuse himself to Johnson for having testified against Johnson, or was conceding falsity, Mr. Hess would not say.

Moreover, it should also be noted that although Goldstein's purported admission of perjury to Hess and the two Johnsons is said to have occurred in the early part of 1941, their affidavits are dated respectively, June 16, 1943, September 21, 1943, and September 29, 1943 (R. 127, 223, 241), *after* the decision of this Court affirming the convictions.

By affidavit, Goldstein asserted that the only statement he made in Hess' office was that he did not care to discuss his testimony. (R. 249.) This agreed with part of Hess' statement. Goldstein also stated in his affidavit that the meeting with Hess, Johnson and Johnson's brother was a

"frame up," that he was told to change his testimony if he knew what was good for him, that he was threatened and that Johnson kept pushing his fingers in his face, and that he finally called his associate, Isadore Goldstein, and left with him. (R. 248-249.) In his second affidavit, Hess admitted that Goldstein came to his office pursuant to a phone call from Hess (R. 227) and that Goldstein phoned Isadore Goldstein and left with him (R. 228). While Hess and the two Johnsons all deny that Goldstein was threatened or that any violence took place, Johnson's brother admits that Johnson pointed his finger in the direction of Goldstein's face and put his hand on Goldstein's knee (R. 222), and the memorandum of the interview by Special Agent Read, which Hess signed, contains the following (R. 246-247):

Mr. Hess stated that the interview described in Affidavit No. 19, lasted about one-half hour, to the best of his recollection, and that the talk at times was rather heated, particularly on the part of John Elmer Johnson. He states that William Goldstein was not roughly handled, although at one stage of the conversation, William R. Johnson, after having repeatedly urged William Goldstein too [sic] admit that his court testimony was false, placed one hand upon Mr. Goldstein's knee and pointed the other hand toward Mr. Goldstein's face with the forefinger and second finger of that hand spread in the form of a "V."

The trial court concluded that Hess' affidavit was "worthy of but little consideration" and "cannot be taken to be evidence that Goldstein committed perjury." (R. 478.) These conclusions were based not only on Goldstein's affidavit but also on the memorandum of the interview with Hess by Special Agent Read, from which the court concluded that Hess' affidavit could as well be taken to mean that Goldstein said he was sorry he testified at all as it could be taken to mean that he was sorry he had lied; on the court's conclusion that the meeting was arranged by Hess in order that the two Johnsons might confront Goldstein and persuade him to recant; and the conclusion that if Goldstein had recanted the defendants would have done something about it at that time, some two years earlier, when the case was first on appeal from their convictions. (R. 478-479.) The trial court also stated that the relationship between Johnson and his co-defendants (represented by Hess) was so close that the final argument to the jury on behalf of all defendants was made by Johnson's counsel, who also conducted the examination on direct of three of Hess' clients. Noting the obvious interest of Johnson and his brother, the trial court stated that their affidavits called for little comment. (R. 479.)

Green.—Actually, only one affiant unequivocally purports to testify to recantation by Goldstein.

Green, a disbarred lawyer* working as a salesman in a bakery shop (R. 477), made three affidavits. In the first one he made no mention of Goldstein's alleged admission (see R. 125-126), despite the fact that according to respondent Johnson, Green "volunteered to make known his knowledge and information regarding the matter" (R. 239). In his second affidavit, executed the day following the first one, Green says that "subsequent to October 1940" (the month the trial ended), Goldstein told him that "his testimony regarding purchases of properties for the said William R. Johnson was false" and that on or about March 15, 1942, Skidmore phoned Green to come over, stated that he wanted his advice concerning a partition suit filed by John E. Johnson on the Bon Air property, and that Goldstein, who was present, stated that Skidmore could not file an answer in the suit because if he did it would definitely establish that his trial testimony was false. (R. 100-101.) Green's third affidavit states that on August 11, 1943, after Goldstein knew Green had executed the second affidavit, in which Green stated that Goldstein had admitted that his testimony was false, Goldstein waited for Green outside the bakery shop

* See *People v. Green*, 353 Ill. 638, 642, 643; where the court referred to Green's conduct as "unprofessional and dishonorable," denoting "lack of good moral character," and stated that "his offenses have been numerous and grave."

and again admitted the falsity of his testimony.¹⁰ (R. 216.)

In separate affidavits, Goldstein denied having had the conversations with Green related by Green in his second affidavit (R. 243) and stated that Green's third affidavit was totally false and the purported meeting and conversation a pure fabrication (R. 264). Goldstein also explained that he had known Green for the past 20 years but had "never been intimate or a confidant with him"; that Green had been disbarred as a lawyer for the past eight or ten years and that he saw very little of him except that a number of times in the past few years Green had begged small sums of money from him, which he gave Green because Green was hungry. (R. 243.)

The trial court rejected Green's affidavits as too improbable to be true, it being unlikely that Skidmore and Goldstein would seek the advice of Green, a disbarred lawyer working as a bakery salesman, regarding the partition suit; or that Goldstein, after knowing of the execution of Green's other affidavits, would seek out Green to tell him a second time that his testimony was

¹⁰ Engelbretson, an employee at the bakery, corroborates the fact that Green met someone and states that he later identified the person as Goldstein. (R. 232-233.) However, Green says that it was when he left the bakery shop that he saw Goldstein walking to and fro across the street, that Goldstein approached him, and that they then had the conversation Green relates. (R. 216.) Engelbretson, on the other hand, says that when he and Green were in the tavern next to the bakery shop he called Green's attention to the man walking to and fro across the street. (R. 232.)

false; or that Goldstein would make a general admission that his testimony "regarding purchases of properties" for Johnson was false when it is incontrovertible that a large part of it was true, including his entire testimony with respect to the Sunny Acres Farm and adjoining Du Page County property, testimony which was corroborated by Johnson himself. For these reasons and the number of opportunities Green gave himself to talk to Goldstein, the trial court concluded that Green had discredited himself. (R. 477-478.)

B

Statements and conduct by Goldstein allegedly inconsistent with his trial testimony

Bon Air.—This is the property as to which Johnson, while asserting that he owned only a one-half interest, admitted Goldstein had quit-claimed full title to him. As the Government showed on respondents' motion, even the insurance policies were transferred from Theodore Goldstein, the record title holder, to Johnson. (See particularly, R. 419, 431, 445.)

Fowler, a former employee of Goldstein who had been discharged for issuing an unauthorized check (R. 264, 265, 267-268), states that Goldstein told him that Skidmore gave him the money to buy Bon Air (R. 213). If true, this alleged statement by Goldstein is directly in conflict

with his testimony that Johnson gave him the money to purchase Bon Air.

Goldstein denies that he made the statement attributed to him by Fowler and states that Fowler has been unfriendly toward him ever since he discharged him. (R. 264.) Attorney Lidschin reveals that suit was brought to restrain Fowler, his son and daughter-in-law and a bank from cashing the unauthorized check issued by Fowler. (R. 267.) As the trial court noted (R. 479), Fowler did not even give the approximate date Goldstein was supposed to have made the alleged statement. Evidence submitted as to one of Fowler's other statements also casts a reflection on his credibility, as the trial court noted. (R. 479-480.)¹¹

¹¹ Fowler stated that he called Goldstein's attention to a bill which Bon Air owed the Waukegan Post (run by Goldstein), that Goldstein said he would see Skidmore about it, and that it was paid a few days later. (R. 214.) Goldstein stated that he had instructed Fowler to send an advertising solicitor to the Bon Air club to see Mr. Johnson about advertising in the Waukegan Post and to get their printing, engraving and art work, that the business was received, and that after the account was long past due and uncollected he told Fowler to turn the account over to an attorney by the name of Joe Miller, who later started suit and collected the bill. (R. 264.) That suit was started and a bill against Bon Air collected was shown by court records and the affidavit of the attorney who handled the matter and did work for Joe Miller. (R. 266-273.) On respondents' amended motion for a new trial they submitted an affidavit by defendant Wait who states that he had full knowledge of the ordering and receipt of merchandise at Bon Air, that he or-

Respondents themselves offered testimony on their motion which, although hearsay, tends to prove that Skidmore did not give Goldstein the money to purchase Bon Air. Respondents' affiant Sperling, floorman and special guard at Bon Air (R. 104), states that in June, 1939, Skidmore gave Garry (cashier at Bon Air (R. 105)) a wrapped package, stating that it contained \$50,000 "to be applied against his share of the cost of the property and the cost and maintenance of the Club" (italics supplied) and that on several other occasions

dered material from the Waukegan Post on April 16, 1941, and that the attached invoice (AR. 76) was the only one which resulted in suit between Bon Air and the Waukegan Post (AR. 75-76). The affidavit and invoice were apparently submitted to corroborate Fowler's statement and refute that of Goldstein and the attorney on the theory that the goods were ordered after Fowler had been discharged by Goldstein (see AR. 167), the invoice being dated July 8, 1941, and the date "4-16" indicating the order or delivery date of the goods. The trial court stated that he did not believe Wait's affidavit had the effect of corroborating Fowler's statement, noting that the defendant Wait testified at the trial that he was 72 years of age and a professional gambler since 1893. (AR. 167.) The trial court's conclusion seems a proper one in view of the fact that, since it is not customary to institute suit to collect a small bill (\$57.60) two months after it is invoiced or even five months after the goods are ordered or delivered, it would appear that the July 8, 1941, invoice was one of a number sent to Bon Air for the same goods and that the date "4-16" referred to the year 1940, when Fowler was employed by Goldstein. It will be remembered that Goldstein said that "after the account was long past due and we could not collect it" he instructed Fowler to turn it over to Joe Miller for collection. (R. 264.) Fowler was employed by Goldstein up until January, 1941. (R. 265.)

Skidmore delivered money in amounts of \$10,000 and \$20,000 to Garry, telling Garry to apply the money on his account of cost and maintenance (R. 105).¹² If Skidmore was paying for his share of the purchase price of the Bon Air properties in 1939, as Sperling testifies, he of course could not have given Goldstein the money to purchase the property in 1937, when the purchase was made.

Albany Park Bank Building.—In this building was located the Lawrence Avenue currency exchange operated by respondent Brown, which carried Johnson's gambling house funds as a single account. (*Supra*, p. 28.) This is the building which Johnson's counsel admitted in his opening statement that Johnson owned, having either purchased it himself or as a partner with someone—the same and only property in which Johnson later denied having *any* interest. It is also one of the properties as to which Goldstein became agent after purchase. Like Bon Air, title to the building was taken in the name of Goldstein's son Theodore. Respondents apparently urge that Goldstein's acts with respect to this building show that he or his son Theodore, rather than Johnson or Skidmore, owns the building.

(1) Amended and delinquent income tax returns filed by Theodore Goldstein, Goldstein's son, re-

¹² Garry corroborates the fact that Skidmore gave him the \$50,000 on one occasion and \$10,000 and \$20,000 on other occasions, but states that it was for the payment of bills. (R. 107.)

porting the rents from the Albany Park Bank Building (AR. 47-74) were the principal new matter submitted to the trial court on respondents' amended motion. Respondents placed pivotal reliance upon these returns, arguing that they showed that Goldstein testified falsely at the trial when he stated that Johnson gave him the money to purchase the Albany Park Bank Building.

Theodore Goldstein, a college student from 1933 to 1938 (AR. 90) who was in the Army from December 11, 1942 (AR. 97), stated by way of affidavit, submitted on respondents' amended motion, that he is the record title holder of the Albany Park Bank Building, not the actual owner; that he never had any interest in the building and has never claimed any interest in it or any income or interest in any income derived from it; that he has at no time received any rents, interest, profits or any other income from the property; that he filed income tax returns for the years 1941, 1942 and 1943 (see AR. 93-97) in which he did not list the rentals from the building as income to him, because he did not receive the rentals and did not regard himself entitled to them; that in the summer of 1944 he signed delinquent income tax returns for the years 1937 to 1940 inclusive, and amended returns for the years 1941, 1942 and 1943 because his father told him that the Internal Revenue Department insisted that he was required to file the returns as record title holder (AR. 89-91). The affidavits

of William Goldstein, Deputy Collector Wodrick and Division Chief Schulz all reflect that numerous conversations were held with William Goldstein regarding payment of income tax on the rentals from the building; that Goldstein repeatedly told the Treasury representatives that his son was merely the record title holder, not the actual owner; and that the returns were filed upon the insistence of the Treasury representatives that Theodore, as record title holder, was liable for tax on the rentals from the building. (AR. 98-99, 104, 105, 110-111.) All three affidavits also reveal that Goldstein refused to sign a statement to the effect that his son was the "owner" of the building (see Gov. Ex. No. 2A, AR. 101) and prepared his own statement to accompany the returns in which Theodore was described as "title holder of record." (AR. 100, 106-108, 111.) Wodrick also confirms Goldstein's statement that Wodrick prepared the income tax returns which were signed by Theodore Goldstein. (AR. 99, 105-106.)¹²

(2) Among other things, Wodrick's affidavit, filed by the Government, states that Goldstein told him "that he received money from persons unknown for the purchase of that building"

¹² Wodrick also confirms Goldstein's statement that he absolutely refused to pay a tax for his son pursuant to a 1937 income tax return prepared by Wodrick to collect a tax on the \$60,000 purchase price of the Albany Park Bank Building. (AR. 99, 106.)

(AR. 104) and respondents have apparently relied upon this as meaning that Goldstein said he did not know who gave him the money to purchase the Albany Park Bank Building (see, e. g., Brief in Opposition, Nos. 115, 116, this Term, p. 16). Wodrick's full statement in this connection was as follows (AR. 104-105):¹¹

Q. When you first contacted Mr. William Goldstein in regard to the ownership of the Albany Park Building, did I understand you to say that Mr. William Goldstein declared he did not know who owned that property?

A. That is right.

Q. What else did William Goldstein say at that particular time in regard to the collection of rents or the ownership of that property?

A. He was rather surprised to hear a question as that as to who was the owner of the building. He said it was all a part of court record and the testimony previously given, and he also stated that he received money from persons unknown for the purchase of that building. He also stated that he didn't know whether it was Skidmore's or Johnson's money. I also

¹¹ Wodrick's affidavit is the one from which we originally derived our information regarding the filing of these income tax returns by Theodore Goldstein—the only information we had at the time we filed our supplemental memorandum in Nos. 153 and 154, 1944 Term, in which, at respondents' request when the case was pending on respondents' petition for certiorari, we advised the Court of the filing of these returns.

asked Mr. William Goldstein the purpose of placing the title in Theodore Goldstein's name, and he replied that at one time William Johnson had an idea of opening a bank, to be located in the building at 3424 Lawrence Avenue, known as the Albany Park Bank Building, and he did not want to disclose the identity of the owners of the building to the people in the neighborhood. I asked Mr. Goldstein whether the rent money was held in an account for the purpose of returning that money to the person or persons to be later identified as the owners of the building. Mr. Goldstein replied that he merely kept the money, but did not have a special account for that purpose.

In a second affidavit, Wodrick explains, with reference to the statement that Goldstein said he received money from persons unknown for the purchase of the building, that (AR. 109-110):

What I meant and intended to say at that time was that Goldstein stated to me that he did not know whose money it was that he had received for the purchase of that building. At no time did I ask Mr. Goldstein who gave him the money for the purchase of that building and at no time did he say that unknown persons gave him the money to purchase that building.

While Goldstein's statements to Wodrick point to prior ownership of the building by Johnson (see also, R. 253) and a present uncertainty as

to the true owner. Goldstein did not, of course, testify at the trial as to the *ownership* of the building.

In the affidavit by Goldstein filed on respondent's amended motion for a new trial, when respondents were relying primarily upon the filing of the income tax returns by Theodore Goldstein on the rentals from the Albany Park Bank Building to show the falsity of Goldstein's testimony, Goldstein stated (AR. 100):

At this time I reaffirm the testimony given by me in the trial of the case of *United States vs. William R. Johnson, et al.*, concerning the Albany Park Bank Building and, in particular restate that the amount expended for the purchase of the Albany Park Bank Building property was \$59,887.05 and that I got that money from Mr. Johnson in the form of currency.

In conclusion I state that I do not have and never did have any right, title or interest of any kind in the property at 3424 Lawrence Avenue, Chicago, Illinois [the location of the Albany Park Bank Building], or in its rents, profits, income or issues, and do not now and never have claimed any such right, title or interest.

(3) Other evidence reflects instances in which Goldstein, having become "spokesman" for the building when it was purchased (*supra*, p. 28), continued to act as agent for the building. The

affiant Blockus states that after the building was placed in receivership on July 26, 1943, because of a tax lien, Goldstein offered to apply the rents from the building on the delinquent taxes. (R. 198-200.) Leases were handled through Goldstein and executed in the name of Theodore Goldstein, the record title holder. (R. 200-206; AR. 76-77, 79-85.) Goldstein collected the rent from the building. (AR. 77.) These things Goldstein admits. (R. 252, 263-264.) He states that the rent money is being held by him until such time as he is released from the lien served by the "Internal Revenue Department" on him to hold all funds and property belonging to Johnson.¹⁵ (R. 252.)

(4) Sampson, upon whose affidavits the Government has relied, in an affidavit submitted by respondents states that Goldstein made the statement to him that "Johnson never had any interest in the property and has nothing whatever to do with it." (AR. 77-78). The statement was supposed to have been made in a conversation

¹⁵ The record shows that Johnson's brother, in addition to Goldstein, has stated that there is a tax lien on Johnson's property and funds. (R. 249-250.) We are advised by the Bureau of Internal Revenue that a number of individuals and companies were served with liens on Johnson's property and funds, that Goldstein was served in April, 1940, and that the Government has not attempted to make collection, it being customary in cases of this kind, where there has been a criminal trial and where the matter is still pending before the Tax Court, to postpone collection until such time as a final decision has been reached as to the income tax liability.

regarding a lease option and can be interpreted as meaning that Johnson has never concerned himself with the building, and that he has never had anything to do with the operation, maintenance or leasing of the building. Moreover, the alleged statement, if it in fact had been made, must be considered in relation to the undisputed evidence of Goldstein's agency for the building and to the admission of Johnson's trial counsel that Johnson owned the building. Goldstein admits that he had discussions with Sampson relative to an option to renew the lease then in existence but denies that he made the statements Sampson attributes to him. (AR. 100.)

(5) Respondents' affiant Blockus states that in his conversations with Goldstein regarding the state tax lien on the Albany Park Bank Building Goldstein said that the property was his. (R. 198-200.) Goldstein denies that he made such a statement (R. 263-264) and says that he told Blockus that "You understand that there is a Government lien against the property and for that reason the party owning the property has not paid his taxes" (R. 263). Blockus admits that Goldstein said that the Government had a lien on the property. (R. 198-200.) Such a statement by Goldstein is in effect an assertion that Johnson owned the property, for the lien is on all funds and property belonging to Johnson. (See R. 249-250, 252.) Goldstein's alleged statement that the property was his—which would be inconsistent with his statement that there was a lien on the

property--is supposed to have been made when Levine and Sampson were present at the county treasurer's office. They both testified by affidavit that they were present during the whole conversation between Goldstein and Blockus and that they did not at any time hear Goldstein make a statement that the property was his (R. 262-263), although in a subsequent affidavit submitted by respondents, Levine states that he did not hear all of the conversation between Goldstein and Blockus (R. 228-229).

It may be noted parenthetically at this point that while respondents seemingly contend that Goldstein or his son Theodore owns the building they also submitted evidence intended to show that Skidmore owns it.¹⁶

In summarizing the evidence as to the Albany Park Bank Building, the trial court stated in his first opinion that respondents had not presented any affidavit stating that the money for the purchase of the building was not given to Goldstein by Johnson (R. 492), thus that "None of the affidavits now presented show that Goldstein, in testifying concerning this property, perjured himself" (R. 492), that Johnson's counsel admitted

¹⁶ Respondents' affiant Miss Sommer, a former stenographer in Goldstein's office, states that she typed income and disbursements statements of the vault company located in the building and mailed them to Skidmore. (R. 165-166.) However, Miss Sommer's statements were at least partially refuted by Goldstein's submission of typed copies of the income and disbursements statements shown to have been prepared by a Miss Koop, an employee at the vault company. (R. 254-259.)

in his opening statement that Johnson owned the building, having either purchased it himself or as a partner with someone, and that consideration of the foregoing impels the conclusion that (R. 494)—

the situation with regard to the Albany Park Bank Building, from an evidentiary standpoint, is not affected by any allegedly new material now offered by these defendants, and that the issue as to whether or not Johnson gave Goldstein the money to buy the Albany Park Bank Building for him remains as it was before the jury.

In his opinion on the amended motion, the trial court added (AR. 166):

In the light of that admission made on the trial [by Johnson's counsel], it approaches the absurd and fantastic that courts should now, more than four years later, be considering motions for a new trial on the ground of newly discovered evidence as to the ownership of the building whose ownership was admitted.

Escrows.—In response to evidence submitted by respondents, Goldstein admits that when the escrow agreements on the two unconsummated sales were not fulfilled by the vendors he served notice cancelling them, receiving the \$7,500 escrow deposit, which he did not return to Johnson because of the Government's lien, but not receiving the \$10,000 escrow deposit. (R. 260-261.) Fowler, the employee Goldstein discharged for issuing an

unauthorized check and who Goldstein says has been unfriendly to him ever since, states that Goldstein told him he had \$7,500 on deposit in escrow at the State Bank of Evanston and later told him he had withdrawn it. (R. 214.) Goldstein denies that he discussed the escrow deposit with Fowler. (R. 264.)

Guild (trustee for the property involved under the \$10,000 escrow agreement (R. 138-139)) and Holleran (attorney for the beneficiaries and trustee (R. 128-129)) state that in their conversations with Goldstein regarding the withdrawal of the \$10,000 escrow deposit, Goldstein stated that the money was his¹⁷ (R. 133, 141, 214). However, Guild and Holleran also reveal that the \$10,000 escrow agreement resulted from the institution and dismissal of a trespass suit relative to property located between Bon Air and the Curran Farm (R. 133, 141); properties as to which Johnson admitted at the trial he owned a one-half interest and contended Skidmore owned the other one-half.¹⁸ Guild and Holleran also corroborate

¹⁷ In conflict with this evidence is the statement of respondents' affiant Hendricksen that Skidmore told him the money was his. (R. 95.)

¹⁸ Johnson, Skidmore, Goldstein and Peacock were apparently the defendants in the trespass suit. (See R. 128, 138.) In December 1937 Goldstein was the holder of a majority of the bonds secured by a deed of trust on the Bon Air country club and Peacock, an attorney formerly in Goldstein's office (R. 188), was appointed trustee under the deed of trust (R. 196).

Goldstein's statement that the vendors had not fulfilled the terms of the escrow. (R. 130-132; cf. R. 141.) Sullivan, attorney for Guild in the trespass suit, reveals in an affidavit filed by the Government that he suggested to Goldstein that there was no lien on the \$10,000 escrow and that part of it could be applied in settlement of the Bon Air trespass suit; that Goldstein replied that the money was Johnson's; that Goldstein refused to withdraw and pay over the money out of the escrow fund unless Sullivan obtained a letter or some form of written authority from Johnson; and that Goldstein stated he would follow Johnson's instructions in making disposition of the fund.¹⁹ (R. 250.) Goldstein makes the same statement as Sullivan with respect to his release of the escrow money pursuant to authorization from Johnson (R. 251-252) and states that the money was deposited in his, Goldstein's, name "for the purpose of not disclosing the identity of the purchaser," that he did not recall at any time stating that it was his money, and that "This

¹⁹ Sullivan also states that he was advised by Johnson's brother and attorney Charles R. Barrett that Johnson could not settle the case because he was not solely liable, if at all, that the damages claimed were excessive, and that Johnson's assets were tied up by a Government lien, but that if Sullivan could secure a settlement from the \$10,000 escrow fund "it was agreeable to Mr. Johnson's counsel, in view of the fact that (according to them) the money was not Johnson's and it was up to Goldstein to do what he saw fit with it." (R. 249-250.)

money was given to me by Mr. William R. Johnson and it is his money." (R. 252.)

The trial court recited all of the facts with respect to these escrows (R. 490-491) but made no particular comment with respect to them, except that he stated, with reference to the \$7,500 escrow deposit, that "The taking of the money down shows no more than the putting of it up and adds nothing that is not merely cumulative" (R. 513).

C

Hearsay and cumulative evidence

The bulk of respondents' motion evidence is either hearsay or evidence which is substantially identical to that submitted at the trial by respondents. All of this evidence, except a small portion with reference to The Dells, bears on the question whether Skidmore had an interest in Bon Air and the adjoining Curran Farm.

The Dells.—The evidence as to this property is repetitious of that produced at the trial (cf. R. 117-118, 231-232, with Nos. 4 and 5, 1942 Term, 3 R. 926-927) and the most important part of it submitted through the affidavits of Hare and Herman, persons who testified at the trial for the defense (R. 474).²⁰

Bon Air, including the Curran Farm.—The hearsay evidence with respect to the Bon Air properties is composed of alleged statements by

²⁰ See also, R. 95, 175, 177-179, 189, and Goldstein's affidavit, R. 260.

Skidmore which, for the most part, merely indicate that Skidmore had an interest in the properties.²¹ Since the evidence was hearsay it could not have been used at the trial already had and cannot be used on a new trial. Were this not true, it would be pertinent to consider the prior availability of the so-called evidence, most of the affiants having been either employees at Bon Air or tenants on one of the properties.

The evidence which is similar to that adduced at the trial (see *supra*, pp. 32-34) and designed to

²¹ As to Bon Air country club, see affidavits of Henricksen (R. 83-84, 90, 91, 95); Green (R. 126); Shaffron (R. 81); Papin (R. 109); Fowler (R. 215). As to Curran Farm, see affidavits of Marie Schmidt (R. 191-192); John Schmidt (R. 192-193); Smith (R. 114); Peters (R. 187); and Kemp (R. 121-122). As to White House, see affidavit of Henricksen (R. 85, 88, 93). As to Green House, see affidavit of Henricksen. (R. 84.) Helen Henricksen's affidavit recites what her husband told her Skidmore told him. (R. 96-98.)

Some of this hearsay evidence is directed toward a showing that Goldstein's trial testimony as to Bon Air was false. Henricksen, the caretaker at Bon Air (R. 83-84) who testified as a state witness in the Roger Touhy and Hugh Banghart trials and described his own active participation in the kidnapping of John Factor (R. 277), states that Skidmore told him that he bought Bon Air, that Johnson would have a one-half interest in it but Johnson did not know about it yet, and that he bought the Curran Farm and did not intend to let Johnson have an interest in it (R. 84, 93). Nadherny, who testified at the trial, states that he heard Skidmore say that he bought the Green House (one of the Bon Air properties) as a surprise gift to Johnson. (R. 98-99.) It will be noted that these alleged statements by Skidmore as to the Green House and White House do not coincide with Johnson's admission that he owns and paid for a one-half interest in these two properties.

show that Skidmore has an interest in Bon Air consists of the recitation of instances where employment of persons, work to be done, or supplies to be furnished were discussed with both Johnson and Skidmore jointly;²² instances of payment of bills by Skidmore;²³ and acts by Skidmore reflecting ownership of Bon Air, such as his giving instructions as to improving and operating the country club or Curran Farm.²⁴

Of the 21 affiants on whose testimony this evidence is based, one testified at the trial,²⁵ five were subpoenaed and not called to testify,²⁶ and five others were employees or performed services at the Bon Air country club.²⁷ The most significant testi-

²² Affidavits of Shaffron (R. 81-82); Henricksen (R. 88); Nadherny (R. 99); Schwefer (R. 102); Love (R. 103); Garry (R. 106); Papin (R. 108); Smith (R. 110); Irwin (R. 173); Tyrell (R. 176-177); Berkley (R. 186).

²³ Affidavits of Shaffron (R. 82-83); Henricksen (R. 86, 87, 92, 94); Love (R. 103-104); Sperling (R. 105); Garry (R. 107); Jacobs (R. 162); Hoffman (R. 163); Piazza (R. 166-167); Weil (R. 176); Wagner (R. 179-180).

²⁴ Affidavits of Henricksen (R. 85-86, 87-88, 89, 90, 91-92, 93-94); Helen Henricksen (R. 97); Nadherny (R. 99); Love (R. 103-104); Sperling (R. 104-105); Garry (R. 106, 107-108); Papin (R. 108-109); Smith (R. 110-112); Piper (R. 119); Kemp (R. 120-122); Green (R. 125-126); Piazza (R. 166-167); Weil (R. 174-175); Barrett (R. 169-170); Walter Peters (R. 124-125); Stewart Peters (R. 187).

²⁵ Nadherny. (Nos. 4 and 5, 1942 Term, 2 R. 72-89.)

²⁶ Garry, Smith, Sperling, Piper and Piazza. (R. 474-475.)

²⁷ Roy Love, one of the so-called stockholders in the Bon Air Catering Company (R. 103); Papin, captain of waiters (R. 108); Irwin, golf professional (R. 173); Weil, laborer doing construction work (R. 174); Tyrell, who booked the shows at Bon Air (R. 176-177).

mony is that of Garry, who states that he was cashier at Bon Air during the summers of 1938 and 1939 "and in said capacity had charge of moneys taken in and paid out both in cash and by check" (R. 106) and, among other things, that Skidmore paid him \$50,000 in cash at one time for payment of bills at Bon Air and at other times when the cash was low gave Garry varying sums in the amounts of \$10,000 and \$20,000 (R. 107). Garry was subpoenaed at the trial but not called to testify (R. 244, 474-475), although Johnson admitted on cross-examination that Garry had come to see him "and wanted to know if he could be of any assistance" at the trial (Nos. 4 and 5, 1942 Term, 3 R. 965). In his closing argument to the jury, Johnson's counsel said he had talked to Garry twice the preceding week and accepted the responsibility for not producing him as a witness. (R. 475.) Sperling, who gave testimony somewhat similar to that of Garry, was also one of the persons who was subpoenaed but not produced as a witness. Roy Love, who was intimately connected with the financial affairs of Bon Air and whose testimony is now offered on respondents' motion, was subpoenaed by the Government during the trial but could not be found. (Nos. 4 and 5, 1942 Term, 3 R. 778-780.)

Peacock, who also was subpoenaed by respondents (R. 342-343) but not called to testify, and Miss Marsh reveal that full title to each of the Bon Air properties, including the Curran Farm,

was transferred to Johnson and that deeds signed by Johnson and conveying a one-half interest to Skidmore were prepared (R. 163-164, 188). This evidence that Johnson conveyed a one-half interest to Skidmore—evidence on which the Circuit Court of Appeals placed so much reliance in its decision granting respondents a new trial (AR. 224-225)—was before the jury through respondent Johnson's testimony (Nos. 4 and 5, 1942 Term, 3 R. 964) and might have been corroborated at the trial by Peacock, *since he was under subpoena* by respondents. The fact that all title was first transferred to Johnson tends, of course, to corroborate Goldstein's trial testimony with respect to the purchase of these properties.

Fowler, the employee who was discharged by Goldstein for issuing an unauthorized check, purports to recite statements by Goldstein indicating that Skidmore had an interest in Bon Air. (R. 214-215.)

On the other hand, as the Government showed, Skidmore, when he testified at his own trial for income tax evasion, was asked when he had purchased his interest in Bon Air and replied, "I never had any interest in it." (R. 316.)

IV

ACTION OF TRIAL COURT ON RESPONDENTS' AMENDED MOTION

The trial court's two opinions denying respondents' motions for a new trial contain an

exhaustive review of all of respondents' motion evidence. (R. 474-514; AR. 151-167.) In each opinion Judge Barnes, the trial judge, states that before passing on the motions he refreshed his recollection of what transpired at the trial. (R. 466-474, 515-516; AR. 168-169.) His ultimate conclusions on the amended motion were as follows (AR. 167-168):

Having considered in detail each separate item of allegedly newly discovered evidence, including not only that now proposed by the movants to be presented to a jury, but also that by their motion filed in 1943 proposed by the movants to be presented to a jury, the court finds and holds that each and every such item is excluded from the classification "newly discovered evidence warranting a new trial" by at least one of the elements of the rule of law applying in such cases and above stated. All but a few items are merely cumulative of other like items presented at the trial. No adequate reason has been presented for the delay of more than four years in the presenting of these merely cumulative items. *All items which are not merely cumulative, are merely impeaching.* The merely impeaching items are found in the proposed testimony of defendant Johnson, John E. Johnson, a brother of defendant Johnson, Hess, attorney at the trial for Johnson's co-defendants, Fowler, a discharged employee of Goldstein, Green, a disbarred law-

yer, and Sampson, who makes an affidavit filed December 4, 1944. All of the defendants have known, or are charged with knowledge of, all impeaching items which they seek to present through the testimony of Johnson, John E. Johnson, and Hess since the spring of 1941—two and one-half years before they were called to the attention of this court. Johnson has known of the matters proposed to be related by Fowler since at least as early as September, 1942, more than one year before it was presented. No adequate reasons have been presented for these delays. The movants have not been diligent as to these items. Green's impeaching evidence is denied by Goldstein (as are all the other items) and, because of its inherent improbability and its source, is not by the court considered worthy of belief. Sampson's alleged impeaching evidence is not in fact impeaching and furthermore is denied by Goldstein. *The court does not believe that Goldstein recanted, does not believe that he perjured himself on the trial and, on the contrary, believes that he was quite circumspect.* The facts are that Goldstein on the trial told (with one exception) only what the various escrow papers and records compelled him to tell. That one exception was the source of the currency that he deposited in the various escrows. His testimony as to the source of the currency is corroborated by the facts and circumstances in evidence. Johnson is the one person re-

ferred to in the evidence who habitually used currency in large amounts (and not bank checks) and habitually kept very large sums of currency on hand. Goldstein's purchase for Johnson of Sunny Acres Farms is a corroborating circumstance. *Finally, the court finds and holds that the allegedly newly discovered evidence is not such or of such nature as on a new trial would probably produce an acquittal.* The court concludes that the amended motion for a new trial on the ground of newly discovered evidence should be denied. [Italics supplied.]

SUMMARY OF ARGUMENT

The judgments of the court below granting respondents' amended motion for a new trial and reversing the trial court's order denying the motion resulted from the conclusion of the majority below that William Goldstein, a Government witness, testified falsely at respondents' trial. This conclusion in turn resulted from a misapprehension of the significance of the material presented and from the majority's action in weighing the motion evidence, in rejecting evidence supporting the trial court's conclusion that Goldstein did not testify falsely at the trial, and in substituting its own judgment as to the weight of the evidence for that of the trial judge. The majority plainly erred in granting respondents' motion on the basis of such a review. It is well settled that an appellate court has authority to

review the denial of a motion for a new trial only for abuse of discretion, and this rule applies to a motion based on allegedly newly discovered evidence. Review for abuse of discretion in respect of factual questions means a review to determine whether the trial court's factual finding is unreasonable, arbitrary or capricious, not a review to determine whether the appellate court's conclusion would be the same as the trial court's had the appellate court been the triers of the facts. An appellate court may review only for error of law resulting from a lack of evidence to support the trial court's factual finding, not for error of fact as to the weight of the evidence. This Court has repeatedly held that a motion for a new trial based on an alleged error of fact is not reviewable.

In granting respondents' motion the majority below also applied the wrong test for the resolution of the merits of a motion for a new trial based on allegedly newly discovered evidence. The test applied by the majority is one which has found proper application in cases of recantation. Here there not only was no recantation but, on the contrary, vigorous reassertion of the witness' trial testimony. Moreover, the recantation test is one to be applied initially by the trial court, not the appellate court. Assuming that it may be extended to a case where there has been a clear and convincing showing of perjury, as distinguished from a recantation, this is not such

a case. Respondents' motion has been based on the erroneous assumption that Goldstein must be considered to have testified to a conclusion which the jury may or may not have inferred from all of the Government's evidence offered in support of the disputed expenditure items. Very little of the motion evidence has any relation to the question whether Goldstein's actual testimony was false. The little evidence which may be classified as impeaching is itself lacking in credibility. The trial court has found that Goldstein did not testify falsely at respondents' trial and this finding, we submit, clearly is not unreasonable, arbitrary or capricious. Accordingly, it was the duty of the court below to accept the finding and to review further for abuse of discretion on the basis of the well settled rule that a motion for a new trial based on allegedly newly discovered evidence will not be granted for cumulative evidence, rarely for impeaching evidence and not at all if the impeaching evidence is not such as would probably produce an acquittal upon a new trial.

The trial judge's finding that Goldstein did not testify falsely at respondents' trial, being a reasonable one, is dispositive of the only ground raised by respondents for the granting of their motion. However, the trial judge also found that the impeaching evidence, if it may even be called that, is not such as would probably produce an acquittal upon a new trial and this

finding is the final, conclusive answer to the merits of respondents' motion. The finding is eminently reasonable, for the so-called impeaching evidence, designed to impeach Goldstein's credibility, presents its own problems of credibility and the jury has already returned verdicts of guilt with as much reason for not believing Goldstein as is presented by respondents' motion evidence. Moreover, Goldstein's testimony was not a necessary part of the Government's case. Respondents' convictions may have been based on the "ownership" theory of proof alone, on which Goldstein's testimony had little bearing, and the "expenditure" theory of proof reinforces the conclusion that Johnson had large unreported income even without Goldstein's testimony. The expenditure charges on Bon Air, mostly for improvements, were the only ones which would change the total of the excess of Johnson's expenditures over his available declared cash resources in any comparatively substantial amount, and the propriety of these expenditure charges was supported by a great deal of proof other than Goldstein's testimony, including respondent Johnson's own prior admissions.

Since nothing of any consequence was added on respondents' amended motion, effect should, we submit, be given to the opinion of the court below on review of respondents' first motion, when the court, on a proper review, concluded that the trial court's finding that Goldstein did not testify

falsely at the trial was not unreasonable, arbitrary or capricious and that the trial judge did not abuse his discretion in denying respondents' motion. The majority decision below is merely an expression of the majority's own views as to the weight of the motion evidence.

ARGUMENT

I

THE MAJORITY OPINION BELOW IMPROPERLY REJECTS THE TRIAL COURT'S CONCLUSIONS AND SUBSTITUTES THE MAJORITY'S OWN CONCLUSIONS AS TO THE WEIGHT OF THE MOTION EVIDENCE INSTEAD OF DETERMINING WHETHER THE TRIAL COURT'S FACTUAL CONCLUSIONS ARE UNREASONABLE, ARBITRARY, OR CAPRICIOUS

While early decisions of this Court hold that the denial of a motion for a new trial is not reviewable by an appellate court except to determine whether the trial court has erroneously excluded from consideration matters which were appropriate to a decision on the motion (*Clyde Mattox v. United States*, 146 U. S. 140, 147; *Haws v. Victoria Copper Mining Co.*, 160 U. S. 303), those decisions appear to apply only when it is alleged that the trial court committed an error of fact (see *Fairmount Glass Works v. Coal Co.*, 287 U. S. 474, 481; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247). The Court has held that a motion for a new trial based on

what would amount to prejudicial error of law will be reviewed for clear abuse of discretion (*United States v. Socony-Vacuum Oil Co.*, *supra*; *Glasser v. United States*, 315 U. S. 60, 87) and the Circuit Courts of Appeals have consistently held or assumed that the abuse of discretion rule also applies in the case of a motion based on newly discovered evidence.²⁸ We therefore assume that the Circuit Courts of Appeals have that limited power of review in cases such as the instant one, as the court below specifically held in its first opinion on appeal from the denial of respondents' motion.

At the outset, it should be noted that the first, unanimous opinion of the Circuit Court of Appeals, in which the trial court's first denial of respondents' motion was affirmed, and the majority opinion below, in which respondents were granted a new

²⁸ See, e. g., *Long v. United States*, 139 F. 2d 652 (C. C. A. 10th); *Roberts v. United States*, 137 F. 2d 412 (C. C. A. 4th), certiorari denied, 320 U. S. 768; *Glover v. United States*, 125 F. 2d 291, 293 (C. C. A. 5th), certiorari denied, 316 U. S. 690; *Weiss v. United States*, 120 F. 2d 472, 475, 122 F. 2d 675 (C. C. A. 5th), certiorari denied, 314 U. S. 687; *Slappey v. United States*, 110 F. 2d 528 (C. C. A. 5th); *Goodman v. United States*, 97 F. 2d 197, 199 (C. C. A. 3d), certiorari dismissed, 305 U. S. 578; *Prisament v. United States*, 96 F. 2d 865 (C. C. A. 5th); *Hale v. United States*, 67 F. 2d 673, 674 (C. C. A. 6th); *Lancaster v. United States*, 39 F. 2d 30, 33 (C. C. A. 5th); *Brown v. United States*, 32 F. 2d 953, 954 (App. D. C.); *Casey v. United States*, 20 F. 2d 752 (C. C. A. 9th); *Camp v. United States*, 16 F. 2d 370 (C. C. A. 6th), certiorari denied, 274 U. S. 754.

trial on appeal from the trial court's second denial of respondents' motion, are decisions based on practically identical motion evidence. The additional evidence relied upon by respondents on their second, amended motion consists primarily of the income tax returns filed by Theodore Goldstein on the rentals from the Albany Park Bank Building, returns which were filed upon the insistence of the revenue agents that he was liable for tax on the rentals because he was the record title holder of the building. (*Supra*, pp. 45-46.) It was the filing of these returns which resulted in remand of the case on the eve of decision by this Court on respondents' petition for certiorari (Nos. 153 and 154, 1944 Term) to review the first judgment of the Circuit Court of Appeals affirming the trial court's denial of their motion. The returns, taken together with the circumstances surrounding their preparation, merely show what was testified to by Goldstein at the trial and was never in dispute—that the record title to the Albany Park Bank Building is in the name of his son. While respondents took advantage of the remand to file two affidavits, neither of the affidavits is of any consequence. One is designed merely to corroborate their affiant Fowler and does not have that effect (see ^{NOTE II} ~~NO. 42~~, *supra*, p. 42); the other is for the most part concerned with the leasing of the Albany Park Bank Building, a mat-

ter on which respondents had submitted evidence on their original motion. As Judge Minton stated in his dissenting opinion on appeal from the denial of respondents' second, amended motion (AR. 235):

The additional evidence adduced in support of the amended motion adds nothing to the proof that was submitted to us on the original motion * * *

The principal question raised by the majority opinion below as to the scope of review for abuse of discretion concerns the scope of review in respect of factual questions, the result reached by the majority being based primarily, if not wholly, on their factual conclusion that Goldstein testified falsely at respondents' trial. A trial judge can also abuse his discretion by failing to consider matters which are pertinent to a decision on the motion (*Clyde Mattox v. United States, supra*) or by the misapplication of erroneous legal criteria. It can hardly be contended, however, that the present case involves an improper exclusion on the part of the trial judge, for he considered respondents' motion evidence exhaustively and, as the court below stated in its first opinion, "with painstaking effort and meticulous care." (R. 583.) While the majority opinion below in effect holds that the trial judge applied the wrong test in passing on respondents' motion, that holding resulted from the majority's

factual conclusion that Goldstein testified falsely at the trial.

In the first, unanimous opinion of the Circuit Court of Appeals on review of respondents' motion the court stated that in the light of the whole record it could not say that the so-called newly discovered evidence inevitably leads to the conclusion that Goldstein testified falsely at the trial and that it could not say that, as a matter of law, the trial court had erred in its finding in that connection (R. 584); it was therefore held that the trial court did not reach its conclusions arbitrarily or capriciously and, as a matter of fact and law, had not abused its discretion in denying the motion (R. 585). In explaining the scope of review for abuse of discretion, the court stated (R. 582):

Certainly we do not have the right to consider the record for the purpose of arriving at an independent finding and judgment of our own which we may substitute for that of the trial judge. We do not sit to try the case de novo. We are to review, as always, for errors of law, which review includes a review of the trial court's action for the purpose of determining whether or not it abused its discretion in reaching the conclusion it did. Pemberton v. United States, 76 F. 2d 596. In determining whether or not the trial court abused its discretion, we consider not only the things which it considered as exhibited

by the record in this Court, but we consider also whether it improperly excluded from its consideration anything that should have been considered. *Mattox v. United States*, 146 U. S. 140. * * * After such a review and consideration, *we do not have the right, where there are no improper exclusions, to substitute our findings or judgment for that of the trial court. We determine by the record only whether the trial judge might reasonably have reached the conclusion which he did.* [Italics supplied.]

In the court's second opinion on review of respondents' motion, the majority, who also sat on the previous appeal, state that "We now think that we accorded" the abuse of discretion rule "a more strict application than the circumstances justified." (AR. 227.) Pursuant to that conclusion, the majority frankly abandon any attempt to determine whether the trial court's factual conclusions are reasonable; substitute their own factual conclusions from the record evidence for those of the trial court; and do this without, as it appears, a thorough knowledge or consideration, as the case may be, of the fundamental facts reflected by the trial record and, in some respects, of the motion evidence. The majority state that, since they have considered only the affidavits of persons who did not testify at the trial and were not subpoenaed (except Peacock) in reaching their conclusion that Goldstein

testified falsely at the trial, "it would appear that we are in as good a position to evaluate the testimony as the trial court." (AR. 226.) In line with this position, the majority state that the affidavits of Goldstein, submitted in opposition to respondents' motions, "carry little, if any, weight" (AR. 225) even though the trial court "saw and heard Goldstein at the trial" (AR. 227), that it is their "considered judgment" that Goldstein testified falsely at the trial (AR. 225); and that they have "reached the conclusion" that he testified falsely (AR. 226). That the majority reviewed the case *de novo* is only too apparent from the manner in which, throughout their consideration of the motion evidence (AR. 210-225), they ignore the evidence supporting the trial court's conclusions as to particular evidence, reject the trial court's conclusions with respect to it, and state their own conclusions, which in many important instances are contrary to the facts disclosed by the record.²⁹ Nowhere in their opinion

²⁹ The following are examples:

Hess affidavit.—"We do not think the testimony of Hess is capable of such construction. * * * we have a direct issue between Hess, a reputable member of the Bar, and Goldstein. Any kind of logic or reason of which we are aware requires the acceptance of Hess' version as true and that of Goldstein as false." (AR. 213.) The majority were under a misapprehension as to what "Hess' version" was. See *supra*, pp. 35-36.

Green affidavit.—"* * * no reason appears on the face of the record as to why he [Goldstein] should be believed in

do the majority state that the trial court's conclusions are unreasonable, arbitrary or capricious.

It would seem too clear for argument that an appellate court has no authority to substitute its preference to Green." (AR. 212.) A very adequate reason appears. See *supra*, pp. 40-41.

Government's affidavits regarding filing of income tax returns by Theodore Goldstein on rentals from Albany Park Bank Building.—"These affidavits as to the 'circumstances' are more illuminating for what they omit than for what they contain." (AR. 218.) "We think the 'circumstances' destroy themselves * * *." (AR. 219.)

Trial court's conclusion that leasing of Albany Park Bank Building in name of record title holder is not inconsistent with Goldstein's testimony.—"We do not agree with such reasoning. We think this circumstance alone, unexplained as it is, comes close to establishing the falsity of Goldstein's trial testimony." (AR. 220.) The explanation, a simple one, is that the trial evidence showed that Goldstein has been acting as agent for the building. See *supra*, p. 28. This same reason explains many other queries of the majority below.

Majority's disbelief of truth of Wodrick's second affidavit, in which he explains a statement made in his previous question and answer affidavit. (AR. 218.) (See *supra*, p. 48.)

"* * * we see no basis for a finding other than that his [Blockus'] testimony was true and that of Goldstein false." (AR. 214.) For the basis of a contrary finding, see *supra*, pp. 51-52.

"Taking all of these things together [the majority's conclusions as to the evidence regarding the Albany Park Bank Building], we have a strong and abiding conviction that Goldstein's testimony concerning the Albany Park Bank Building was false." (AR. 220-221.)

Marsh and Peacock affidavits.—"They furnish strong circumstantial proof of the falsity of Goldstein's testimony * * *." (AR. 225.) As the trial court noted, the evidence adduced through them was cumulative on the issue of ownership of Bon Air. See *supra*, pp. 59-60.

own conclusions as to the weight of the evidence for those of the trial court. See, e. g., *United States v. Alger*, 68 F. 2d 592, 593 (C. C. A. 9th); *Detroit City Gas Co. v. Syme*, 109 F. 2d 366, 368 (C. C. A. 6th); *Finé v. United States*, 55 F. 2d 9 (C. C. A. 7th). Judicial opinion as to the weight of evidence is not synonymous with abuse of judicial discretion. See *Day v. Donohue*, 62 N. J. L. 380 (1898); *People v. N. Y. C. R. R. Co.*, 29 N. Y. 418, 431 (1864). Abuse of discretion consists of arbitrary action³⁰—action which is unreasonable, against logic and for which there is no justification in the facts or inferences to be drawn therefrom.³¹ Thus, as respondents have urged (see R. 582) and as the court below held in its first opinion on review of respondents' motion, the appellate court's function, in respect

³⁰ *Home Owners' Loan Corp. v. Huffman*, 134 F. 2d 314, 317 (C. C. A. 8th); *Hartford-Empire Co. v. Obear-Nester Glass Co.*, 95 F. 2d 414, 417 (C. C. A. 8th); *Sulzbacher v. Continental Casualty Co.*, 88 F. 2d 122, 125 (C. C. A. 8th); *McDonough v. Goodcell*, 13 Cal. (2d) 741, 748-749 (1939); *State ex rel. Nielsen v. Superior Court*, 7 Wash. (2d) 562, 566-567 (1941).

³¹ *Webber v. Webber*, 157 Minn. 422, 427 (1923); *Root v. Bingham*, 26 S. D. 118 (1910); *Murray v. Buell and others*, 74 Wis. 14; 19 (1889); *Manufacturers Ass'n v. Exhibitors*, 268 Mich. 685, 689 (1934); *Quinn v. State*, 54 Okla. Cr. 179, 185 (1932); *Michaels v. Moritz*, 131 Pa. Super. Ct. 426, 427 (1938); *Grant v. Michaels*, 93 Mont. 452, 459-460 (1933); *Mielcuszny et al. v. Rosol*, 317 Pa. 91, 93-94 (1934); *Williams v. Parsons*, 79 Kan. 202, 207 (1908); *State v. Draper*, 83 Utah 115, 143 (1933); *State v. Ferranto*, 112 Ohio St. 667, 677 (1925); *Kinnear v. Dennis*, 97 Okla. 206, 207 (1924).

of factual issues, is to determine whether the trial court's conclusions from the evidence are unreasonable, arbitrary or capricious. In exercising that function, the appellate court must of course consider and in a sense weigh the evidence, but its consideration of the evidence must be directed toward a determination of whether there is any justification or basis in reason for the trial court's conclusions. If there is justification or a basis in reason for the trial court's conclusions, it is the duty of the appellate court to accept the trial court's conclusions, not weigh the evidence to determine whether its own conclusions agree with those of the trial court, as Judge Minton reiterates in his dissent from the second opinion.³² A review *de novo* like that of the majority

³² Judge Minton states (AR. 230-231):

"I am unable to agree with the majority opinion because I think it clearly invades the province of the trial court. We do not sit here to pass upon the facts upon this motion. That is for the trial court. We sit only to review the trial court's action, and to determine whether or not the trial court abused its discretion.

"In reaching this determination, we do not dispute with the trial court on the conclusions it reached on the facts. We determine only whether the trial court reached a decision it might reasonably have reached upon the facts before it; not whether we on those facts, might have reached a different conclusion. If the trial court reached a conclusion while [*sic*] it might reasonably have reached, and excluded nothing from its consideration which it ought to have considered, it has not abused its discretion. That is the only question we have to determine. I think a fair review of the trial court's decision requires us to conclude that there was a basis in reason for its decision and that there was no abuse of its discretion."

below invades the province of, and nullifies the discretion vested in, the trial court. As in the case of the review of a factual determination of an administrative agency, of the sufficiency of the evidence to support a verdict, or of the factual findings of a trial court in a civil case, the appellate court reviews for error of law resulting from a lack of support for the finding of the triers of fact, not for error of fact as to the weight of the evidence. As this Court has consistently and repeatedly held, the denial of a motion for a new trial is not reviewable for error of fact. *United States v. Socony-Vacuum Oil Co.*, *supra*, p. 247; *Fairmount Glass Works v. Coal Co.*, *supra*, p. 481, and decisions there cited.

Contrary to the opinion of the majority below (AR. 227), the scope of review is not enlarged simply because some of the evidence under consideration may consist of affidavits or documents. In the case of the granting or denial of a motion for a new trial based on newly discovered evidence, the trial judge must be accorded a broad latitude in the exercise of his discretion. On such a motion, the motion evidence, written or oral, must be considered with relation to its effect on the trial already had and on a possible new trial. Manifestly, the trial judge is the one most competent to determine that effect. He alone has a true perspective of the case and of the relationship and significance of the trial evidence, as well as a thorough

knowledge of the trial evidence. The majority opinion below, which indicates a misunderstanding of the factual issues and a lack of familiarity with the trial testimony, illustrates the importance of the trial court's background. In the instant case the trial judge also saw and heard the very witness whose credibility is under attack on respondents' motion, as well as other witnesses whose affidavits were submitted on respondents' motions, notably respondent Johnson.

Hamilton v. United States, 140 F. 2d 679 (App. D. C.), relied upon by the majority below, does not support their conclusion that they are entitled to review the denial of respondents' motion *de novo*. In that case, the defendant had been arrested at night and tried and convicted the next morning on the uncorroborated testimony of a police officer. Four days later two uncontroverted affidavits of newly discovered evidence of witnesses were filed. In holding that the language of one of the affidavits had been construed by the trial court with undue narrowness, the Court of Appeals observed that the case was one (pp. 681-682) —

where the sole evidence to support a conviction is the word of the arresting officer, and where in addition the prosecution without any apparent reason has declined to produce corroborating evidence which the record shows might have been offered. Under such circumstances we think it was

an abuse of discretion when the trial court indulged in a hypothetical interpretation of the statement of newly discovered evidence in order to make it consistent with the testimony it was intended to rebut.

II

THE TRIAL COURT APPLIED THE PROPER LEGAL CRITERIA IN PASSING ON RESPONDENTS' MOTION

In passing on respondents' motion, the trial court considered itself bound by the well established rule,³³ succinctly stated in *Berry v. State of Georgia*, 10 Ga. 511, that a new trial will not be granted if the only object of the evidence adduced on a motion for a new trial is to impeach the character or credit of a witness and that it is incumbent upon the party who asks for a new trial on the ground of newly discovered evidence to satisfy the court that the evidence has come to his knowledge since the trial, that it was not owing to a want of diligence that it did not come sooner, that the evidence is not cumulative of evidence produced at the trial, and that it is so

³³ See, e. g., *Weiss v. United States*, 122 F. 2d 675, 691 (C. C. A. 5th), certiorari denied, 314 U. S. 687, rehearing denied, 314 U. S. 716; *Wagner v. United States*, 118 F. 2d 801 (C. C. A. 9th), certiorari denied, 314 U. S. 622, rehearing denied, 314 U. S. 713; *Evans v. United States*, 122 F. 2d 461 (C. C. A. 10th), certiorari denied, 314 U. S. 698; *Long v. United States*, 139 F. 2d 652, 654 (C. C. A. 10th); *Johnson v. United States*, 32 F. 2d 127, 130 (C. C. A. 8th); *Prisament v. United States*, 96 F. 2d 865 (C. C. A. 5th); *Baird v. United States*, 279 Fed. 509 (C. C. A. 6th).

material that it would probably produce a different verdict if a new trial were granted. In conformity with this test, the trial judge both times denied respondents' motion because of his conclusions that Goldstein did not recant and did not testify falsely at the trial, that all of the respondents' motion evidence which was not merely cumulative was merely impeaching, that the allegedly newly discovered evidence is not such or of such a nature as on a new trial would probably produce an acquittal, and that respondents had not been diligent in presenting their cumulative evidence. (R. 514-515; *supra*, pp. 61-63.) In its first opinion, the Circuit Court of Appeals held that the trial court applied the correct test, stating that the test "has been followed in the Federal cases and is of almost universal application among the States." (R. 584-585.) The court at the same time rejected respondents' contentions that the so-called rule of *Larrison v. United States*, 24 F. 2d 82 (C. C. A. 7th), applied; stating that in that case and others cited for the same rule "the court was discussing the rule where there had been a recantation or where it had been proved that false testimony had been given on the former trial" and that this is not such a case. (R. 583.) In contrast, the majority, on the second review of the trial court's action, state that the rule of the *Berry* case, stated above, was applied in their first opinion on the premise that there had been no showing of the falsity of Goldstein's testimony

(AR. 227-228), that the majority "now have disapproved of the finding of the lower court relative to the falsity of Goldstein's testimony" and "concluded that Goldstein's testimony was false" (AR. 228), and, accordingly, that the rule of the *Larrison* case, *supra*, is applicable. That rule was stated in the *Larrison* case to be that a new trial should be granted when (a) the court is reasonably well satisfied that the testimony given by a material witness is false; (b) that without it the jury might have reached a different conclusion; and (c) that the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. Having determined that this rule is applicable here because of their conclusion that Goldstein's testimony was false, the majority state that "We think we need not labor the point that the jury might have reached a different conclusion without it" (AR. 228) and that "we think it may be taken for granted that the defendant Johnson knew of the falsity of Goldstein's testimony at the time it was given and likewise that he was unable to meet it" (AR. 229).

The so-called rule of the *Larrison* case is one which has properly found application in cases of recantation by a witness. All the federal cases cited by the majority in support of its position were addressed to that situation. In *Pettine v.*

Territory of New Mexico, 201 Fed. 489 (C. C. A. 8th), an important witness recanted and asserted that he had been intoxicated at the time of his trial testimony. In *Martin v. United States*, 17 F. 2d 973 (C. C. A. 5th), the court referred in dictum to the rule applicable where a witness admits that he testified falsely or that he was mistaken. In the *Larrison* case itself, a prior decision of the court below, the court denied remand for the purpose of passing on a motion for a new trial but stated the requisites for a new trial in the case of recantation. The case involved a recantation followed by a repudiation thereof and it was for that reason that the rule was stated to apply where the court is "reasonably well satisfied that the testimony given by a material witness is false." (AR. 228.)²⁴

In holding the so-called rule of the *Larrison* case applicable here, the majority below have extended that rule to a case where there has been no recantation but, on the contrary, vigorous re-assertion of the witness's trial testimony. We should have no quarrel with an extension of that rule to a case where there has been a clear and

²⁴ In *State v. Mounkes*, 91 Kan. 653 (1914), the final case cited by the majority below, testimony given by a Government witness a few minutes before the close of the case was later shown by conclusive evidence to be false. The fact drawn in issue was whether a school yard contained a flower bed surrounded by stones. The evidence brought forward after the trial showing the existence of that physical fact, by photographs and otherwise, was beyond dispute.

convincing showing of perjury, found by the trial court. Here, however, the extension of the rule by the majority below is made by virtue of a departure from established practice, the majority having undertaken a *de novo* review of the motion evidence presented to the trial court. The requirements of the so-called rule are factual and, as we have shown, the trial court's finding that Goldstein did not testify falsely must be accepted by the appellate court if that finding is not unreasonable, arbitrary or capricious. As we shall show, the trial court's conclusion is not unreasonable, arbitrary or capricious; indeed, there is no warrant in the record for a finding that Goldstein did testify falsely. This necessarily means that the so-called rule of the *Larrison* case is not applicable here and that, as the trial court found, the motion evidence which is not merely cumulative is merely impeaching, in that it is evidence which might furnish the basis for attacking Goldstein's credibility on cross-examination at a second trial. Under such circumstances, the only true test for resolving the merits of respondents' motion is to determine whether the impeaching evidence would probably result in an acquittal upon a new trial, assuming that impeaching evidence may be a ground for a new trial in an exceptional case (see *infra*, p. 110). This is not to say that the trial already had must be ignored. On the contrary, a determination of the probable

effect of respondents' impeaching evidence on a new trial must necessarily be made with reference to the result reached at the trial already had; during which, among other things, the credibility of Goldstein's testimony was vigorously attacked and was squarely in issue.

III

THE TRIAL JUDGE'S FINDING THAT GOLDSTEIN DID NOT TESTIFY FALSELY AT RESPONDENTS' TRIAL IS NOT UNREASONABLE, ARBITRARY OR CAPRICIOUS

A. *Respondents' erroneous conception of Goldstein's testimony*

Respondents' contention that Goldstein testified falsely at their trial is based upon a misconception of the scope of Goldstein's testimony. They conceive Goldstein to have testified that respondent Johnson was the sole owner of the Bon Air properties, Albany Park Bank Building, The Dells, and the property at 9730 So. Western Avenue. (See, e. g., Respondents' Brief in Opposition, Nos. 115, 116, present term, pp. 17-18.) As we have shown in the Statement (*supra*, pp. 12-16) and as a reading of Goldstein's testimony (Appendix A, *infra*, pp. 118-137) reveals, his testimony, so far as it is subject to attack as being false, was merely that Johnson gave him the money and requested him to purchase these properties and to make the two escrow deposits on unconsummated sales. In the petition for certiorari which

respondents filed last term (Nos. 153 and 154, October Term, 1944, pp. 28-31); they frankly argued that the falsity of Goldstein's testimony must be resolved by determining whether its "import" was false and, in accordance with their conception of its "import," that Goldstein must be considered to have testified that Johnson was the sole owner of the properties.³⁵ They urged, as a reason for this position, what they have consistently stated throughout the proceedings on their motion and even prior thereto—that Goldstein's testimony was the *sole* proof offered by the Government at the trial in support of enormous expenditures charged to Johnson under the expenditure theory of proof. (See, e. g., Brief for William R. Johnson on Re-Argument, Nos. 4 and 5, 1942 Term, p. 76; Motion for a New Trial, R. 14; Petition for Certiorari, Nos. 153 and 154,

³⁵ In line with their contention, respondents stated in their brief in opposition in the instant case (Nos. 115, 116, October Term, 1945, pp. 17-18) that "Goldstein made a misstep * * * when he testified as to the Albany Park Bank Building" that "I was requested by Mr. Johnson to go out there and purchase the building *for him.*" [Italics supplied by respondents.] We readily concede that Goldstein's testimony as to all of the properties can be construed to mean that he purchased the properties for Johnson in the sense that it was Johnson who requested him to make the purchases. But in limiting his testimony to statements as to who furnished the money and requested him to make the purchases, Goldstein obviously expressed no opinion as to who became the owner or owners of the properties after their purchase. Especially is this true in the light of his testimony on cross-examination. (See *supra*, p. 14.)

October Term, 1944, pp. 8-9, 29.) On this premise, now accepted by the majority below (AR. 228), respondents have asserted that our position—that the issue of whether Goldstein testified falsely should be resolved simply by considering the motion evidence in relation to his trial testimony—“betrays” a “callous indifference to fair administration of justice” and demonstrates that “by the adoption of inconsistent positions” the Government “seeks to benefit by the misapprehension of the evidence” by the jury and courts and at the same time deprive respondents of a new trial “based on newly discovered evidence addressed to the *received import* of the perjured testimony.” [Italics supplied.] (Petition for Certiorari, *id.*, pp. 28-29.) The acceptance of this claim that Goldstein must be deemed to have testified that Johnson was the sole owner of the properties was one of the reasons for the result reached by the majority below.³⁶

The trial judge, on the other hand, noted that (R. 464):

While it is claimed in the defendants' brief that Goldstein committed wilful per-

³⁶ The majority below state (AR. 211):

“In our opinion, the government makes an ill advised attempt to escape defendants' contention that Goldstein testified that Johnson was the owner of the properties in question but embraced nothing more than the bare fact that in the purchase of the various properties involved the money for such purchases was received from Johnson. Especially is this true in light of the fact that the cornerstone of the

jury on the trial, the defendants have refrained from quoting the exact testimony of Goldstein and from calling attention to its limited scope. Instead, the defendants have characterized this testimony and have generalized in respect of it in such a manner that one not acquainted with the actual testimony given might be misled into attributing to Goldstein testimony never uttered. Thus, by assertion and generalization of defendants, it is made to appear that Goldstein testified not only that Johnson was the owner of certain properties but that he was the sole and only owner thereof. Throughout defendants' brief this assertion is reiterated. * * *

There is no basis whatever for the position that Goldstein must be considered to have testified that Johnson was the sole owner of these properties.

government's case was that Johnson was the owner. Based largely on Goldstein's testimony, the government has succeeded in convincing the jury and court after court that such was the case."

At another point (AR. 225), it is stated with respect to what the majority term "the most remarkable disclosure in this record" (AR. 224):

"If these two witnesses [Marsh and Peacock] have spoken the truth, which there is no reason to doubt, they furnish convincing proof of the truth of Johnson's trial testimony that he was the owner of only one-half interest in Bon Air, as well as some of the other properties involved. If true, they just as conclusively shatter the foundation upon which this prosecution has been constructed. They furnish strong circumstantial proof of the falsity of Goldstein's testimony and demolish the implication which was drawn therefrom and used by the government to such good advantage."

Moreover, Goldstein's testimony was *not* the sole proof offered by the Government at the trial in support of enormous expenditures charged to Johnson on the assumption that he was the sole owner of the properties. The largest and by far the most significant of the disputed expenditures charged to Johnson were the amounts for *improvements* on the Bon Air country club over and above what Johnson admitted spending and, as we have shown in the State-ment (*supra*, pp. 30-32), those expenditure charges were made on the basis of a great deal more evidence than Goldstein's testimony that Johnson gave him the money and requested him to purchase the Bon Air country club property. The alleged "inconsistent positions" asserted to have been taken by the Government refer to (1) our position in connection with the sufficiency of the evidence to support respondents' convictions, that Goldstein's testimony was evidence which the jury might properly consider in connection with the question whether Johnson had made the expenditures charged to him by the Government on the properties in question, and (2) our position on respondents' motion, that Goldstein's testimony was not shown to be false unless what he testified to was shown to be false. We fail to see any inconsistency in these positions. Even if Goldstein's testimony had been the sole basis for charging Johnson with enormous expenditures, there would be no warrant for determining the issue of the falsity of his testimony

on the basis of what the jury may or may not have inferred from it.

In taking the obviously correct position that Goldstein cannot be held to have testified falsely to something he did not testify to at all, we have not urged that the "import" or effect of his testimony was to be ignored by the trial court, only that it was to be considered separately. The so-called rule of the *Larrison* case, *supra*, upon which respondents have relied, itself requires separate consideration of the issues of falsity and effect. (See *supra*, pp. 80-83.) In our brief in the trial court we specifically stated that "it is clear that the Court [trial court] must consider and evaluate the new evidence to determine what its possible effect might have been upon the jury" (R. 311-312), citing the *Larrison* case, *supra*. We took the position, of course, that the well established rule already stated (pp. 79-80), not the so-called *Larrison* rule, was applicable to the case (see R. 280-281, 306, 311-313), but in applying that well established rule the trial judge necessarily considered the "import" and effect of Goldstein's testimony in conjunction with the effect of respondents' impeaching evidence when he found that "the allegedly newly discovered evidence is not such or of such nature as on a new trial would probably produce an acquittal" (AR. 168). The "import" and effect of Goldstein's testimony is considered at pages 112-116 in

connection with the appropriateness of that finding of the trial judge.

B. Discussion of trial judge's finding

Both times he denied respondents' motion, the trial judge stated (R. 515; AR. 168):

The court does not believe that Goldstein has recanted, does not believe that he perjured himself on the trial and, on the contrary, believes that he was quite circum-spect. The facts are that Goldstein on the trial told (with one exception) only what the various escrow papers and records compelled him to tell. That one exception was the source of the currency that he deposited in the various escrows. His testimony as to the source of the currency is corroborated by the facts and circumstances in evidence. Johnson is the one person referred to in the evidence who habitually used currency in large amounts (and not bank checks) and habitually kept very large sums of currency on hand. Goldstein's purchase for Johnson of Sunny Acres Farms is a corroborating circumstance. * * *

If the trial judge's conclusion that Goldstein did not testify falsely is a reasonable one, it would seem effectively to dispose of the only ground on which respondents have relied for the granting of their motion. However, impeaching evidence may apparently be a ground for a new trial in an exceptional case if it is such that it would probably produce an acquittal. Accordingly, the impeaching evidence will, as we have stated, also be considered in that connection later.

Before considering the impeaching evidence, it should be noted that in its first, unanimous opinion the court below, on a proper review, concluded, after a careful consideration of the record, that the trial judge's conclusion that Goldstein did not testify falsely at the trial was not unreasonable, arbitrary or capricious. The opinion of the majority below on the second appeal merely reflects the majority's own views of the motion evidence. In the circumstances, the finding of the trial court on a factual issue should, we submit, be given effect. *Delaney v. United States*, 263 U. S. 586, 589-590; *United States v. Johnson*, 319 U. S. 503, 518. At least, in view of the misapprehension of the facts which the majority display in their opinion, it should be particularly significant that Judge Minton who wrote the first opinion, in which the court stated it had "carefully considered the record" (R. 583), dissented from the second opinion of the court, stating (AR. 231):

I think a fair review of the trial court's decision requires us to conclude that there was a basis in reason for its decision and that there was no abuse of its discretion.

The majority below make much of the fact that Goldstein had a motive for testifying falsely. (AR. 210, 225.) The same could be said for a number of the "obviously unwilling" witnesses (319 U. S. at 516) whom the Government was compelled to call at the trial. Since respondents will no doubt also rely upon Goldstein's alleged motive,

we should perhaps mention that since Goldstein was already under indictment for perjury in another connection he had just as much motive for testifying truthfully; that his alleged motive—the protection of Skidmore—had no relation to the result, for Skidmore was later convicted for income tax evasion; and that any implications to be drawn from Goldstein's possible motive for testifying falsely are dissipated by the fact that the jury was aware that Goldstein was under indictment for perjury and that the instant indictment had been dismissed as to both Goldstein and Skidmore.

It should be noted that only a portion of Goldstein's testimony is subject to attack as being false. As we have shown in the Statement (*supra*, p. 16), respondent Johnson himself admitted the truth of Goldstein's entire testimony with respect to the purchase for more than \$150,000 of the Sunny Acres Farm and adjoining DuPage County real estate, conceding full ownership of those properties. Moreover, in addition to that part of Goldstein's testimony which was corroborated by the escrow papers in evidence, his testimony that he made the purchases and escrow deposits with currency and that quitclaim deeds to the properties were delivered to Johnson was incontrovertibly corroborated by other evidence. This leaves only his testimony that Johnson gave him the money and requested him to purchase the Bon Air property, the Albany Park Bank Build-

ing, The Dells, and the property at 9730 So. Western Avenue and to make the two escrow deposits on unconsummated sales. Even this testimony has corroboration in the trial record. As the trial judge noted (*supra*, pp. 62-63), Johnson was the one person who habitually used currency instead of bank checks and carried large sums of cash—\$10,000 to \$15,000—in his pockets. (See, e. g., Nos. 4 and 5, 1942 Term, 3 R. 965.) Perhaps even more significant is Johnson's corroboration of Goldstein's testimony regarding the purchase of the DuPage County real estate adjoining the Sunny Acres farm, for that piece of property was purchased in exactly the same manner as the other properties about which Goldstein testified, namely, with payment in currency, record title taken in the name of Goldstein's nominee and a quitclaim deed subsequently delivered to Johnson. The fact that Johnson admitted ownership of at least a one-half interest in the Bon Air properties, The Dells and the property at 9730 So. Western Avenue made it as likely as not that he had been the one to give Goldstein the money to purchase those properties. Respondents' failure to cross-examine Goldstein regarding the Bon Air properties and the Albany Park Bank building is significant, as is Johnson's own admission, corroborated by the affidavits of Marsh and Peacock submitted on respondent's motion, that Goldstein gave him full title to the Bon Air properties.

Only a relatively small portion of respondents' motion evidence has any bearing on the question whether Goldstein testified falsely in any respect, and even the majority below recognized when they stated that "Much of it, as far as we can ascertain, is immaterial to the issue." (AR. 210.) The immaterial evidence which is not totally irrelevant to the case is to a large extent cumulative of that adduced at the trial on the question whether Johnson was the sole owner of the Bon Air properties. The submission of this evidence on a motion which purports to be based on the ground that Goldstein testified falsely at the trial is consistent with respondents' unwarranted assumption that Goldstein testified that Johnson was the sole owner of these properties, but since cumulative evidence is not ground for a new trial (*infra*, p. 108), is hardly consistent with a conclusion that respondents' motion was made in good faith.

Overlooking the limited nature of Goldstein's testimony and the fact that much of it was incontrovertibly true, respondents submitted the testimony of four affiants designed to indicate that Goldstein had made general recantations. Three of these affiants are Hess (counsel for Johnson's co-defendants at the trial), respondent Johnson and Johnson's brother, whose testimony all relates to the same incident. The testimony of these affiants is discussed in the Statement, *supra*, pp. 35-38. In view of Hess' disclosures to Special Agent Read, the obvious interest of all

three affiants and the fact that the alleged statement by Goldstein was supposed to have been made *more than two years before* the execution of the affidavits, when respondents might certainly be expected to have taken action if Goldstein had recanted, it seems quite obvious that the trial judge could hardly have reached any other conclusion than that the affidavits of these three affiants could not be taken to be evidence that Goldstein committed perjury. This is not a case such as that portrayed in *Hamilton v. United States, supra*, discussed above at page 78, where the trial judge unjustifiably construed an ambiguous affidavit too narrowly; it is an instance in which affidavits submitted by the movants for a new trial are misleading and have been explained in their true light by the least interested of the affiants.

Maurice Green, a discharged lawyer working as a bakery salesman, whom Goldstein states he saw very seldom except when Green begged small sums of money from him, unqualified purports to testify to recantation by Goldstein. Green's stories, contained in three different affidavits (R. 100-101, 125-126, 216-217), discussed in the Statement (*supra*, pp. 40-41), are so improbable as to impel the conclusion that they are unworthy of belief. The trial judge's conclusion that Green had discredited himself is manifestly a reasonable one, although the majority below prefer to believe Green in preference to Goldstein by ignor-

ing everything except the fact that Green is a disbarred lawyer, which they state is no reflection on his credibility. However, evidence to warrant a new trial must at least be credible. *Evans v. United States*, 122 F. 2d 461 (C. C. A. 10th), certiorari denied, 314 U. S. 698; *Goodman v. United States*, 97 F. 2d 197, 199 (C. C. A. 3d).

Since a large part of Goldstein's testimony was incontrovertibly true and Johnson admitted that Goldstein had purchased the DuPage Country real estate for him, as to which title was taken in the name of Goldstein's nominee, the evidence submitted by respondents on the issue of the falsity of Goldstein's testimony can appropriately be considered only from the angle of the showing made as to the falsity of his testimony regarding each property. Except for the affidavits intended to show recantation, just discussed, respondents impeaching evidence, if it may even be called that, relates primarily to the Bon Air properties, the Albany Park Bank Building and the two escrow deposits on unconsummated sales.

. *Bon Air*.—Apart from the foregoing, the only newly discovered evidence submitted by respondents to impeach Goldstein's testimony regarding the purchase of this property is the statement contained in the affidavit of Fowler that Goldstein told him that Skidmore gave him the money to purchase Bon Air. (*Supra*, pp. 41-42.) In fact, this is the only direct evidence on the issue of falsity submitted by respondents as to *any* of the specific properties,

except for the reiterated denials of respondent Johnson, who testified at the trial and contradicted not only Goldstein but almost every other witness with whom he had a conversation or transaction. Since it is indisputable that Fowler was an employee discharged by Goldstein for issuing an unauthorized check and that an injunction suit was brought to restrain Fowler from receiving the fruits of his unauthorized act, the trial judge was plainly justified in disbelieving Fowler's statement on the ground of prejudice. Moreover, Fowler was discredited on another of his statements. (See n. 11, *supra*, p. 42.) Goldstein also denies having made the statement to Fowler and states that Fowler has been unfriendly toward him since his discharge.

Some of the affidavits submitted by respondent, particularly that of Henricksen, who had testified at the notorious Touhy and Banghart trials and described his own active participation in the kidnaping of John Factor, contain hearsay, consisting of alleged statements by Skidmore supposed to indicate that he made the original purchase of some of the Bon Air parcels. None of these hearsay statements can be considered newly discovered evidence, for they were not admissible at the trial already had and would not be admissible upon a new trial. *Donnelly v. United States*, 228 U. S. 243; *Boyd v. United States*, 30 F. 2d 900, 901 (C. C. A. 9th). The so-called evidence

carries no weight even if it be assumed that it may be considered on the issue of the falsity of Goldstein's testimony. In the first place, some of the alleged statements by Skidmore are patently unreliable because inconsistent with Johnson's own admissions. (See n. 21, *supra*, p. 57.) Secondly, at his own trial for income tax evasion Skidmore was asked when he had purchased his interest in the Bon Air country club and replied, under oath, "I never had any interest in it." (R. 316.) This statement should carry as much weight, if not more, than his other alleged statements relayed to the trial court second hand. Thirdly, there is no apparent reason why Skidmore's alleged statement as to the purchase of some of the Bon Air properties should be believed in preference to the alleged statement of Skidmore testified to by respondents' affiant Sperling, floorman and special guard at Bon Air. Sperling states that in *June 1939* Skidmore gave \$50,000 at one time to Garry, cashier at Bon Air, and stated that it was "to be applied against his share of *the cost of the property* and the cost and maintenance of the Club." [Italics supplied.] (*Supra*, p. 43.) If Johnson and Skidmore each owned a one-half interest in Bon Air, as respondents attempted to show at the trial and again now on their motion, and Skidmore was paying for his share in June 1939, it must have been Johnson who gave Goldstein the money to purchase the property in 1937, when the pur-

chase was made. However, the trial judge did not even rely on this revelation by Sperling. He merely stated that "the fact that this is said to have taken place in 1939 throws doubt on the accuracy of the statement." (R. 510.) While the trial judge thus gave respondents the benefit of the doubt, it should be noted that Garry, who is supposed to have received the money from Skidmore, also testified that the incident took place in June 1939, although he says the \$50,000 was for the payment of bills. (R. 107.) According to Johnson's trial testimony, he and Skidmore put in only \$10,000 to \$15,000 at a time for the payment of bills. (Nos. 4 and 5, 1942 Term, 3 R. 965.) Thus, the situation with respect to respondents' hearsay evidence appropriately demonstrates the reason for the rule that hearsay evidence is inadmissible. As this Court stated in *Donnelly v. United States, supra*, p. 276:

* * * "hearsay" evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible.

Albany Park Bank Building.—Despite the admission of Johnson's counsel in his opening state-

ment at the trial that Johnson had either purchased this building himself or as a partner with some one, the failure to correct this statement during the six-weeks trial other than through one of the numerous denials made by Johnson when he testified toward the end of the trial, and the fact that the question of ownership of all the other properties as to which Goldstein testified was whether Johnson was the sole owner or whether he and Skidmore were equal owners, respondents nevertheless now contend that Goldstein himself, or perhaps Goldstein's son Theodore, is the owner of the Albany Park Bank Building. From this they apparently infer that Goldstein testified falsely when he stated that Johnson gave him the money and requested him to purchase the building. We fail to understand how such an inference can be drawn from this evidence.

Concededly, the aura of mystery concerning the ownership of this building is unusual. But this is an unusual case. Respondents' convictions were based on ample proof that Johnson was the proprietor of a string of gambling houses, which, "while ostensibly conducted as separate enterprises by his co-defendants in separate ownership, was in fact a single unified gambling enterprise." (319 U. S. at 516.) The enterprise was an "elaborately concealed illegal business" and reflected a "skilful concealment." (*Id.* at 518.) The same pattern of concealment was followed in respect of

the properties purchased by Goldstein, the purchases being made with currency and record title being taken in the name of one of Goldstein's nominees rather than in the name of the true owner. That Johnson used this type of concealment is indisputable in view of his admission that Goldstein purchased the DuPage County real estate adjoining the Sunny Acres farm for him. The record title to all of these properties apparently remained in the name of Goldstein's nominee for otherwise there would have been no dispute at the trial as to their ownership and Goldstein would not have even been called upon to testify regarding the escrow papers. Title to the Albany Park Bank Building was taken in the name of Goldstein's son Theodore, as in the case of the Bon Air country club, in which Johnson conceded he had a one-half interest. Johnson's counsel admitted in his opening statement that the rents from the building were being collected by an agent and applied to the upkeep of the building. That agent was shown to be Goldstein, for it was he who, like the ostensible owners of Johnson's gambling establishments, became "spokesman" for the building immediately after its purchase. With Johnson now in a position where he would not be expected to reveal his ownership in the building, Goldstein naturally would carry on as agent by leasing the building, collecting the rents and offering to apply them on a state tax lien against the building.

The very fact that a tax lien came into existence after the trial indicates that the true owner can hardly be Goldstein.

We see little reason why Goldstein should be censured for the filing of the income tax returns on the rentals from the building by his son Theodore, since the returns were filed at the insistence of the local representatives of the Bureau of Internal Revenue that, as record title holder, Theodore was liable for tax on the rentals. (See *supra*, pp. 44-46.) Taxes are frequently paid first and contested later and Goldstein no doubt was in any event entitled to deduct the taxes from the rentals he was collecting. While the testimony of the local Bureau representatives discloses, as the trial judge stated (AR. 165-166) a somewhat "extraordinary and remarkable effort" on their part to procure a statement from Goldstein to the effect that his son was "the owner," Goldstein's refusal to sign such a statement reaffirms his trial testimony. There is no warrant for the statement of the majority below that the returns are necessarily false if Theodore is not the actual owner of the building (AR. 219); for Goldstein prepared a statement to accompany the returns which states that his son is the "record title holder" and the returns were filed on the assumption that Theodore was liable for the tax as record title holder, Goldstein having repeatedly told the Treasury representatives that

his son was not the actual owner of the building. Since they insisted that Theodore file the returns and pay tax on the rentals, Goldstein obviously cannot be criticized because Deputy Collector Wodrick, who prepared the returns, allowed deductions for depreciation, etc. on the building. We see no justification for any other conclusion than that the returns and the circumstances surrounding their filing show nothing more than what Goldstein testified to at the trial—that his son Theodore, as in the case of the Bon Air country club, was the record title holder.

Respondents' motion evidence contains two statements which are apparently offered as proof that Goldstein owns the building. Blockus states that in discussions regarding the state tax lien Goldstein said the property was his. As we have shown in the Statement (*supra*, pp. 51-52), little credence can be given Blockus' statement. Sampson who leased the building for a time, asserts that Goldstein told him Johnson "never had any interest in the property and has nothing whatever to do with it." (*Supra*, pp. 50-51.) Since Goldstein denies making this statement and according to Sampson it was supposed to have been made in a discussion regarding a lease option, it seems reasonable to conclude that Goldstein made some sort of statement that was misinterpreted by Sampson, such as that Johnson *had never taken* any interest in the building and *has had* nothing

whatever to do with it. This changes its entire meaning and makes the statement one which was indisputably true, Goldstein having acted as agent since its purchase in 1937. But even if the statement be taken to mean what respondents read into it, it is one that any agent for an undisclosed principal might have made in similar circumstances.

All of these matters obviously relate to the ownership of the building, not to the question whether Goldstein testified falsely in connection with its purchase. Goldstein, or anyone else for that matter, might very well have become the owner of the building at any time subsequent to the purchase of the building in 1937 and Goldstein's testimony still would not be false. We do not mean to suggest that Goldstein did become the owner, but it must be recognized that the question of present ownership has no conclusive bearing on the question whether Goldstein testified falsely when he stated that Johnson gave him the money and requested him to purchase this building. Especially is this true in view of the concealments that surrounded all of Johnson's business transactions. On the issue of falsity, respondents have offered not an iota of proof.

Escrows.—Respondents apparently contend that Goldstein has claimed ownership of two escrow deposits on unconsummated sales, in the amounts of \$7,500 and \$10,000, and from this apparently conclude that he must have testified falsely when

he stated that Johnson gave him the money for the escrow deposits. As in the case of the Albany Park Bank Building, respondents do not even establish their premise.

From the motion evidence regarding these escrow deposits, set forth in the Statement (*supra*, pp. 53-56), it can readily be seen that Goldstein is not claiming them for himself. He has received the \$7,500 deposit because the vendors did not fulfill the terms of the escrow agreement, but having put it up he was the only one who could take it down, no matter to whom it belongs. He states he is holding it subject to the Government's lien against Johnson's property and funds and there is nothing in respondents' evidence which disputes his word on that score.

As to the \$10,000 escrow deposit which Goldstein has not received, the only evidence submitted by respondents which tends to support their contention is the testimony of two persons to the effect that, in discussions regarding the withdrawal of the deposit for failure to fulfill the terms of the escrow agreement, Goldstein said the money was his. Goldstein states he does not recall stating the money was his and reiterates that the money was given to him by Johnson "and it is his money." (R. 252.) As against Goldstein's alleged statement that the money was his, respondents themselves reveal the most significant fact that the deposit was made as a result of a trespass suit as to property located between the Bon Air

Country Club and the Curran Farm, properties in which Johnson admits one-half ownership and contends Skidmore owns the other half. Further, Sullivan, attorney for the plaintiffs in the trespass suit, testified that he suggested to Goldstein that there was no lien on the \$10,000 deposit and hence it could be applied in settlement of the trespass suit and that Goldstein refused to withdraw or pay over any part of the escrow fund for that purpose unless Sullivan obtained written authority from Johnson.

Thus, in the final analysis the evidence bearing on the question whether Goldstein testified falsely at respondents' trial consists of affidavits by three highly interested persons (Hess and the two Johnsons) which misleadingly reflect a general recantation by Goldstein; an affidavit of general recantation by the untrustworthy Green; one alleged statement by Goldstein testified to by the prejudiced and discredited affiant Fowler; totally unreliable hearsay evidence; a variety of items of cumulative evidence; and inferences which respondents unwarrantedly expect to be drawn from the peculiar position in which Goldstein has been placed with respect to the Albany Park Bank Building and two escrow deposits by reason of the perpetuation by Johnson of his skillful concealment of his affairs. In the Statement we have endeavored to set forth all of the allegedly newly

discovered evidence. The trial court's conclusion that Goldstein did not testify falsely is a reasonable one, especially in view of the trial corroboration of his testimony and the opportunity that the trial judge had to observe Goldstein's demeanor on the stand. It is also not without significance that respondents have been arguing the falsity of the conclusion that Johnson was the sole owner of these properties, not the falsity of Goldstein's actual testimony.

IV

THE TRIAL JUDGE PROPERLY DENIED RESPONDENTS' MOTION ON THE GROUNDS THAT THEIR MOTION EVIDENCE IS MERELY CUMULATIVE OR IMPEACHING AND NOT SUCH AS WOULD PROBABLY PRODUCE ACQUITTALS ON A NEW TRIAL

As we have already shown, respondents' evidence on the question whether Goldstein testified falsely as to his purchase of the Bon Air properties consists only of a few affidavits that were properly discredited. All the rest of the motion evidence relating to the Bon Air properties, set forth in the Statement, has a bearing only on the question of the ultimate ownership of the properties. Since the question whether Johnson was the sole owner or only a one-half owner with Skidmore was directly in issue at the trial on the basis of conflicting evidence (*supra*, pp. 32-34), the motion evidence submitted by respondents to prove that Skidmore had an interest

in *Bon Air* is merely cumulative of evidence previously adduced. As a comparison of respondents' trial evidence and motion evidence in this connection reveals, most of the motion evidence was of exactly the same nature as that adduced at the trial by respondents. It is well settled that cumulative evidence is not ground for a new trial. *Weiss v. United States*, 120 F. 2d 472, 475, 122 F. 2d 675 (C. C. A. 5th), certiorari denied, 314 U. S. 687; *Wagner v. United States*, 118 F. 2d 801, (C. C. A. 9th), certiorari denied, 314 U. S. 622, rehearing denied, 314 U. S. 713; *Prisament v. United States*, 96 F. 2d 865, 866 (C. C. A. 5th); *Mason v. United States*, 95 F. 2d 612, 614 (C. C. A. 5th); *Hale v. United States*, 67 F. 2d 673, 674 (C. C. A. 6th); *Johnson v. United States*, 32 F. 2d 127, 130 (C. C. A. 8th); *Boyd v. United States*, 30 F. 2d 900, 901 (C. C. A. 9th); *Camp v. United States*, 16 F. 2d 370 (C. C. A. 6th), certiorari denied, 274 U. S. 754; *Gwin v. United States*, 294 Fed. 878, 880 (C. C. A. 5th); *Baird v. United States*, 279 Fed. 509, 512 (C. C. A. 6th). The appropriateness of this rule should need no comment other than that there must be an end to litigation sometime, a result, however, which in this case has not yet been achieved after a period of more than five years. Manifestly, these respondents are not entitled to retry the issue of the ownership of the *Bon Air* properties on the basis of evidence which they had available to them at the trial and failed to

use (*supra*, pp. 58-59) and other evidence which they reasonably could be expected to have obtained during the six-weeks trial. The basis of respondents' motion is supposed to be *newly* discovered evidence and a showing of diligence in respect of it is one of the fundamental requirements on a motion for a new trial. (See *supra*, p. 79.)

The evidence from which respondents conclude that Goldstein is the owner of the Albany Park Bank Building, discussed above, may possibly be classifiable as either cumulative or impeaching, or perhaps both. From an evidentiary standpoint, it plainly does not change the trial picture as to the ownership of this building. That Goldstein was the "spokesman" for the building and his son Theodore the record title holder are facts substantiated by the motion evidence, but they are also facts which were before the jury. There was no intimation at the trial that Goldstein or his son might be the owner of the building, but respondents are hardly in a position to obtain an advantage from whatever inferences in that connection they may draw from the motion evidence. Johnson's counsel in his opening statement accurately described the history of the building and its operation and conceded that Johnson owned the building, having either purchased it himself or as a partner with someone (*supra*, pp. 18-19) and this statement was never corrected during the trial, except insofar as Johnson, when he took the

stand toward the end of the trial, included a denial of ownership of this building among his numerous other denials. While respondents no doubt now regret the concession made at the trial, it was nevertheless one upon which the jury was entitled to rely, unless we are to assume that a new trial may be granted for an error; if such it was, of competent counsel made in the presence of the defendants and not retracted. As the trial court stated (AR 166) :

In the light of that admission made on the trial, it approaches the absurd and fantastic that courts should now, more than four years later, be considering motions for a new trial on the ground of newly discovered evidence as to the ownership of the building whose ownership was admitted.

Impeaching evidence, as distinguished from cumulative evidence, as a general rule is not ground for a new trial but apparently may be so in an exceptional case. *Slappey v. United States*, 110 F. 2d 528 (C. C. A. 5th); *Long v. United States*, 139 F. 2d 652 (C. C. A. 10th); *Miller v. Commonwealth of Kentucky*, 40 F. 2d 820 (C. C. A. 6th); *Casey v. United States, supra*; *Goodman v. United States, supra*; *United States v. Holtz*, 288 Fed. 81 (E. D. N. Y.), affirmed, 293 Fed. 1019 (C. C. A. 2d); *M'Donough v. United States*, 299 Fed. 30 (C. C. A. 9th), motion denied, 1 F. 2d 147 (C. C. A. 9th), certiorari denied, 266 U. S. 613. Certainly we should not care to urge that cogent, impeaching evidence which would

plainly result in an acquittal upon a new trial may not be grounds for a new trial. But since respondents' impeaching evidence, so clearly presents its own problems of credibility, we see no reason why this case should be an exception to the general rule. New trials for newly discovered evidence are not favored (*Casey v. United States, supra*, p. 754) and will be granted with great caution (*Weiss v. United States, supra*; *Long v. United States, supra*).

Since respondents are not in any event entitled to a new trial unless their allegedly newly discovered evidence would probably produce an acquittal (*supra*, pp. 79-80), the final, conclusive answer to the merits of their motion is that the trial judge's factual finding that the motion evidence "is not such or of such nature as on a new trial would probably produce an acquittal" (*supra*, p. 63) is a reasonable one. A determination of the reasonableness of the finding must of course be considered with reference to the trial already had.

It should be sufficient that the trial picture as to the credibility of Goldstein's testimony would not be charged by the impeaching evidence respondents submit on their motion. Since Hess would not say that Goldstein had admitted the falsity of his testimony, the effect of any testimony by Hess or the two Johnsons with respect to the conversation referred to in their affidavits, would be at most highly conjectural. Green and

Fowler could, of course, be placed on the stand but cross-examination of them would probably reveal their lack of credibility even more than does the present record. The hearsay evidence would be inadmissible and respondents would not be entitled to attack the credibility of Goldstein's testimony by introducing evidence from which mere inferences in that connection might be drawn. Thus, the situation with respect to Goldstein's credibility would not be materially different from what it was at the trial already had, when, among other things, Johnson made denials and stated that he heard Goldstein "testify to a lot of other things that are not true" (Nos. 4 and 5, 1942 Term, 3 R. 977), and a court witness twice testified (*id.*, 2 R. 73, 87), shortly after Goldstein, that the defendant Wait (who was acquitted) had stated that part of Goldstein's testimony was false. As a matter of fact, respondent Johnson, in his brief on reargument in Nos. 4 and 5, 1942 Term, p. 76, asserted that Goldstein's trial testimony "was shown by cross-examination * * * and otherwise to be wholly unworthy of belief." We do not concur in this conclusion; we merely mention it because it reflects a recognition that the question respondents are raising on their motion for a new trial is one which a jury has already passed upon with as much reason for not believing Goldstein as is contained in respondents' motion evidence.

The question whether the jury did or did not believe Goldstein is of no importance here. As

this Court has stated, the "ownership" theory of proof was alone sufficient to support respondents' convictions. Goldstein's testimony had no bearing on the proof on that theory other than the fact that the Lawrence Avenue Currency Exchange operated by respondent Brown and shown to have been used as a depository for Johnson's gambling house receipts (see our Brief on Reargument in Nos. 4 and 5, 1942 Term, pp. 29-30, 55-60, 75-80) was located in the Albany Park Bank Building. It was of only relatively minor significance whether Johnson owned the building or not so far as his use of the currency exchange for that purpose was concerned. We of course cannot assume that the jury convicted respondents on the "ownership" theory of proof alone but, on the other hand, we must necessarily conclude that the jury did not rely on the "expenditure" theory of proof alone either, for the convictions of the respondents other than Johnson were based on the evidence that they "consciously were parties to the concealment of his [Johnson's] interest in these gambling clubs of which they themselves pretended to be proprietors." (319 U. S. at 518.) Accordingly, the jury must have considered the "expenditure" theory of proof only in connection with the question whether Johnson had large unreported income. As this Court has stated, "Of course the government did not have to prove the exact amounts of unreported income by Johnson."

(*Id.* at 517.) It is extremely unlikely that the jury considered the "expenditure" theory of proof other than as supporting the general conclusion that Johnson had large unreported income, regardless of what the amount of it might be. Certainly, since the Government's case was so predominantly based upon the "ownership" theory of proof, it would be incongruous to assume that the jury weighed the evidence as to each expenditure charged to Johnson under the "expenditure" theory of proof. Assuming that they did, however, the jury may not only have disbelieved all of Goldstein's testimony but rejected all of the Government's direct evidence as to Johnson's ownership of Bon Air and still would have been forced to conclude that Johnson's expenditures were nevertheless substantially in excess of his available declared cash resources and that, accordingly, the "expenditure" theory of proof reinforced the "ownership" theory of proof. (See *supra*, p. 12.)

Moreover, even if it be assumed that the jury considered the propriety of each expenditure charge and believed Goldstein, Goldstein's testimony could have had no material effect on the conclusion the jury reached with respect to the propriety of the Bon Air expenditure charges, the only ones which could make any substantial change in the amount of the total excess of Johnson's expenditures over his available declared cash resources. As our statement of the trial evidence offered by the Government in that connection

shows (*supra*, pp. 30-31), these expenditure charges, mostly for improvements, were supported by direct proof that Johnson was the sole owner of Bon Air, proof which included Johnson's own prior admissions and his statements to accountants that he alone had paid for the Bon Air properties and improvements thereon. Respondents, and now the majority below, have simply been in error in assuming that Goldstein's testimony was the sole basis for these expenditure charges. Goldstein did not even testify regarding the ownership of the Bon Air country club. His testimony could hardly have been misconstrued by the jury, for on cross-examination, when he was questioned only regarding The Dells and the property at 9730 So. Western Avenue, he stated that he did not know whether or not Johnson was the sole owner of those properties and, after being shown the deeds to the latter property of a one-half interest to Johnson, concluded that Skidmore owned the other half. (See Appendix A, *infra*, p. 133.) Goldstein's testimony that he purchased the Bon Air country club at Johnson's request with money furnished him by Johnson, was direct proof as to Johnson's payment of the purchase price of the property, but on the question of ownership and the large expenditure charges for improvements his testimony was only evidence from which an inference might be drawn in conjunction with the other more direct evidence.

Since Goldstein's testimony was evidence before the jury, we of course included it in our summary of the evidence in our brief on reargument in Nos. 4 and 5, 1942 Term. We did not then and do not now purport to know whether the jury accepted his testimony. Indeed, the jury may have rejected all of the Government's evidence intended to show that Johnson was the sole owner of Bon Air. But assuming that the jury did believe Goldstein, nevertheless, in view of the fact that there was other *direct* proof that Johnson was the sole owner of Bon Air, it is improper to assume, as respondents now do (*supra*, p. 86), that the "received import" of Goldstein's testimony alone was that Johnson was the sole owner of the Bon Air country club. In this connection, it is interesting to note that, when the question of the sufficiency of the evidence to support their convictions was under review by this Court, respondents asserted that Goldstein's testimony "was shown" at the trial to be "wholly unworthy of belief" (*supra*, p. 112), which we presume was intended to mean that his testimony had no weight at all with the jury, and now on their motion for a new trial assert that the "received import" of Goldstein's testimony was that Johnson was the sole owner of these purchased properties and his testimony so material that without it the jury might have reached a different verdict.

We have taken little note of the question of respondents' good faith and diligence in presenting their motions for a new trial. The record should speak for itself in that connection.

CONCLUSION

The judgments of the Circuit Court of Appeals should be reversed and the order of the District Court affirmed.

Respectfully submitted,

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SAMUEL O. CLARK, Jr.,
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Special Assistants to the Attorney General.

NOVEMBER 1945.

APPENDIX A

Nos. 4 and 5—1942 Term

William Goldstein, called as a witness on behalf of the [2 R. 55'] Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. HURLEY:

My name is William Goldstein. I live at 415 Aldine Avenue, Chicago. I am a practicing lawyer in the City of Chicago. I have been licensed to practice law in the state of Illinois twenty-five years. I did have certain dealings concerning the purchase of property at 9730 South Western Avenue in the city of Chicago—I think it was in 1937. The property was six or seven vacant lots. [2 R. 56.] Government's Exhibit E-27 is an escrow agreement for the purchase of lots 32 and 33 in the subdivision at 97th and Western. There were \$3,465 deposited in connection with that escrow in the Chicago Title & Trust Co. by myself, on April 26, 1937. I got that money from William R. Johnson in the form of currency. I paid that money over to the Chicago Title & Trust Co. for the purchase of lots 32 and 33 in Frederick H. Bartlett's Beverly Highland Subdivision. I purchased the property at the request of William R. Johnson. The title for that property was taken in the name of Isador Goldstein, my law partner.

¹ All references which follow are to the record in Nos. 4 and 5, 1942 Term.

There was a deed executed from Isador Goldstein to Ann Homan, my stenographer, and a quit claim from Ann Homan, including the other lots, to William R. Johnson. I delivered the quit claim deed to Mr. Johnson. Government's Exhibit E-28, for identification, is an escrow agreement made between myself, the seller, and Chicago Title & Trust Company. The seller was Tim Quail, represented by Kilgallon. There was \$3,150.00 deposited on that escrow. The property was lots 34 and 35 in Frederick H. Bartlett's Beverly Highland Subdivision, 97th and Western. I deposited the money myself, and received it in the form of currency from William R. Johnson. I made the purchase at the request of Mr. Johnson. Government's Exhibit, E-29, for identification, is an escrow agreement I entered into with Mr. Richard J. Edgeworth on April 26, 1937, to lot 31 in the same subdivision. There was \$2,500 deposited with the Title & Trust Company in the form of currency received from Mr. Johnson. I made the purchase at the request of Mr. Johnson. The title was taken to that property in the name of Isador Goldstein, my law partner. A quit claim deed was delivered to William R. Johnson by myself.

I handled the escrow contained in Government's Exhibit E-30. It is concerning the purchase of Lots 38 and 39 in the Frederick H. Bartlett's Beverly Highland Subdivision. The seller is Mr. Tim Quail and Mr. Kilgallon. \$4,000, in the form of currency, was deposited in connection with this escrow by me with the Chicago Title & Trust Co. I got the money from Mr. Johnson. I purchased the property at the request of Mr. Johnson. Title

was taken by Miss Ann Homan, my secretary. Subsequently a quit claim deed was made to William R. Johnson, which was delivered to him by myself.

I did have something to do with the purchase of the property known as the Albany Park Bank Building, at [2 R. 57] 3424 Lawrence Avenue. I went out to the Albany Park Building and interviewed a gentleman by the name of Mr. Larson, who was the chief clerk for Mr. Carter H. Harrison, Junior, who is the receiver for a number of banks closing out. They had an office out at that address. I had a conference with him in connection with the purchase of that building. After making a number of calls and negotiations I submitted an offer. I was requested by Mr. Johnson to go out there and purchase the building for him. The offer was submitted to the Treasury Department at Washington for approval and after it was approved I believe I made a deposit with Mr. Larson of five thousand dollars at the time. I received the money from Mr. Johnson, in the form of currency. There was a notice, I think, published in the newspaper that the building would be sold to the highest bidder at a certain date, at which time I appeared and bid, I think, around sixty thousand, fifty-nine thousand and some-odd dollars for it. I purchased that property at the request of Mr. Johnson. The exact amount of money expended for the purchase of that property I think was around \$59,800. After looking at the closing statement I can state that the amount expended for the purchase of that property was \$59,887.05. I got that from Mr. Johnson in the form of currency.

Title to that property was taken in the name of Ted W. Goldstein, my son. Subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son. This Albany Park Building property was purchased July 16, 1937.

I did have a part in the purchase of property known as the Bon Air Country Club. I acted at the request of Mr. Johnson. I think it was the latter part of 1937. I handled the negotiations for the purchase of it and after arriving at a price went out there, I think, on one or two occasions, at Mr. Johnson's request. I went out there and looked the premises over to see what it was like, and then I got in touch with Mr. Blumstein, who is the attorney for the Evanston Bank, in Mr. Poppenheusen's office, and Mr. Becker, who represented the bank, came down. We talked. It took about three or four months until we arrived at the price. The bank were the receivers. The price arrived at was \$75,000. I think the initial deposit of \$7,500.00 was deposited with Mr. Becker at the Evanston Bank and Mr. Blumstein, the attorney. I received the money from Mr. Johnson in the form of currency. The deposit was made [2 R. 58] in the office of Mr. Blumstein. The balance of \$67,500 was paid over to Mr. Becker and Mr. Blumstein at their law offices, in the form of currency that I received from Mr. Johnson. Title to that property was taken in the name of Mr. Ted W. Goldstein. A quitclaim deed was subsequently delivered to William R. Johnson by myself. I think approximately 180 acres were involved in that transaction.

I had something to do with the acquisition of other property out in the neighborhood of this Bon Air Country Club. Government's Exhibit E-32, for identification, is an escrow that was executed by me. Seller was Mr. James A. Flynn. There was \$8,000 in currency, received from Mr. Johnson, deposited on that escrow by myself. The property was purchased at the request of Mr. Johnson, and the title to that property was taken in the name of Ted W. Goldstein. Subsequently a quitclaim deed to Mr. William R. Johnson was delivered to him by myself. Lot 15 in the Columbia Gardens Subdivision was involved in that purchase. The transaction took place on May 16, 1938.

Government's Exhibit E-33, for identification, contains an escrow executed by me. Albert Tatge was the seller, and involves a house located at the Southwest corner of Milwaukee avenue and Chevy Chase Avenue. The amount of money involved is \$8,500, deposited by myself on that escrow, and received from Mr. Johnson in the form of currency. It was deposited in the Chicago Title & Trust Co., April 1, 1938. The property described in Exhibit 33 was purchased at the request of Mr. Johnson. Title was taken in the name of Ted W. Goldstein. Subsequently a quitclaim deed was delivered to Mr. Johnson by myself.

I did execute the escrow contained in Government's Exhibit E-34, on May 2, 1938. The amount of money deposited was \$4,000, with the Chicago Title & Trust Company, Escrow Department. The property involved is lots 25, 26 and 27, in that Columbia Gardens Subdivision. I pur-

chased that property at the request of Mr. Johnson and received the money deposited from him in the form of currency. Title to that property was taken in the name of Ted W. Goldstein. Subsequently a quitclaim deed was delivered to Mr. Johnson by myself.

I executed the document contained in Government's Exhibit E-37, for identification, on June 9, 1939. That involved about 175 or 180 acres adjoining the Bon Air. \$60,000 was deposited in that escrow by myself. I received the money from Mr. Johnson in the form of currency. At [2 R. 59] his request I purchased that property. Title to that property was taken in the name of Abe Zimmerman. Subsequently a quitclaim deed was delivered by Mr. Abe Zimmerman to Mr. William R. Johnson.

I executed the escrow contained in Government's Exhibit E-38, on June 10, 1939. That involved 11 or 12 acres East of the Des Plaines River, opposite the Bon Air. The property I just described a moment ago, in connection with that \$60,000 adjoins part of the property on the East side of the Bon Air and part on the West side of Milwaukee Avenue, within a short distance of this other property. There was \$3,800 deposited by myself on that escrow. I purchased that property at the request of Mr. Johnson, from whom I received that money in the form of currency. Title was taken in the name of Mr. Abe Zimmerman. There was a quit claim deed from Abe Zimmerman to Mr. William R. Johnson delivered to him by myself.

I executed the escrow contained in Government's Exhibit E-35 for identification, on Novem-

ber 22, 1936. That involved 8 acres on Dempster Road, in the village of Morton Grove. It is not located with reference to any other property out there. It was formerly known as the Dells property. \$10,000 was involved in that transaction. There was a deposit of that amount made with the Chicago Title & Trust Co. by myself. I received that \$10,000 from Mr. Johnson in the form of currency and purchased that property at his request. Title was taken in the name of Isador Goldstein, my law partner. A quit claim deed was subsequently made by Isadore Goldstein to William R. Johnson and delivered to him by myself.

The escrow contained in Government's Exhibit E-36, for identification, was executed on February 10, 1937. That was 4 acres adjoining the 8 acres of the Dells property. \$9,000 was involved in that transaction. I purchased the property at the request of Mr. Johnson, from whom I received the money deposited with the Chicago Title & Trust Co., in the form of currency. Title to that property was taken in the name of Isador Goldstein, who made a quit claim deed to Mr. William R. Johnson, which I delivered to him.

I executed the escrow contained in Government's Exhibit E-31 for identification on March 18, 1937. That involved 773 acres in DuPage County. Mr. Johnson requested me to get in touch with a gentleman who had an office in the First National Bank Building, and take up the matter of [2 R: 60] purchasing this particular property. It is known as the Cutten farm, or Sunny Acres farm, located in DuPage County, near Wheaton. After taking it up with this real

estate man we finally agreed on a price, and I reported to Mr. Johnson about it, and arranged for an appointment with Mr. Johnson and the sellers. The escrow was executed on March 18, 1937, at the Chicago Title & Trust Co. \$145,000 was involved in that transaction. I met Mr. Johnson by appointment on that date in the lobby of the Chicago Title & Trust Co. Building. We went upstairs to the 5th floor, the escrow department, where we executed the escrow agreement. The \$145,000 was in the form of currency. The bills were different size. It was a pretty good size package—I would not know just exactly—I guess it was wrapped up in paper. Mr. Johnson had that money when I met him in the lobby. We met this real estate man and Attorney Stickler of the Escrow Department and we arranged and executed this escrow agreement. Mr. Johnson and myself counted the money and went down to the cashier in the office of the Title & Trust Co. It took about an hour and a half or two hours to count the money. That is all that happened that day in connection with that transaction. Title to that property was taken in the name of Mr. William R. Johnson.

I have seen Government's Exhibit E-41, for identification, on April 12, 1937. That has relation to the Sunny Acres. The name was the Cutten Estates. I think 160 acres of land were involved in the purchase, adjoining to the East of the Sunny Acres farm. I had a conversation with the defendant Johnson before the purchase of this property. He told me he wanted to buy this farm adjoining this property. I got busy and found that an attorney by the name of

George W. Thoma, in Elmhurst, represented the seven or eight heirs who owned this property. We arrived at a price and purchased it. \$16,500 was involved. I received that money from Mr. Johnson and deposited it at the Gary-Wheaton bank, in Elmhurst, in escrow. I received the money from Mr. Johnson. Title to the property was taken in the name of Isadore Goldstein, my law partner. Subsequently a quitclaim deed was made to that property by Isadore Goldstein to Mr. Johnson, which I delivered to him. That was about April 12, 1937.

I deposited the money with the Chicago Title & Trust Co. in connection with the purchase of some land adjoining the property to the Curran farm, which has relation to the [2 R. 61] escrow contained in Government's Exhibit E-39, for identification. This property was in between the Curran farm and the Bon Air properties. \$10,000 was involved, covering some lots and acreage. The money was deposited with the Chicago Title & Trust Co., in the form of currency. I received it from Mr. Johnson, at whose request the deposit was made, on July 17, 1939. There were no other deposits made in connection with that property, but there were as to other properties in the same vicinity. The amount of money involved was \$7,500, deposited at the State Bank of Evanston, in the form of currency, by myself, which I received from Mr. Johnson. I made the deposit at his request.

I think there was another piece of property adjoining the Curran farm, of 11 acres, east of the DesPlaines river, that I purchased. Something like \$1,350 was involved. I purchased that

property at the request of Mr. Johnson, from whom I received the money in the form of currency. That was about the same date or shortly after the Curran property was purchased. I think title was taken in the name of Abe Zimmerman. Subsequent, a quit claim deed was made to William R. Johnson, which I delivered to him. I delivered the quit claim deeds to Mr. Johnson personally. The money delivered to me by Mr. Johnson was personally delivered by Mr. Johnson.

I never did collect any rent from the property known as 9730 Western Avenue. I understand there was a one story building placed on that property. I talked to Mr. Creighton about having collected rent from that property. I see Mr. Creighton here in the courtroom (indicating the defendant Creighton). I think the conversation took place some time last year, I believe, I think in February or March of 1940 at my office. He came in to see me, and told me he had been over at the Federal Building and had a talk with the District Attorney in connection with the building, and he told him that he leased that property from me and was paying me five hundred a month. I told him it was not true. We got into a little discussion about it. He knows it was not true. He never gave me any money for rent on that building. I do not know anything about it. Then he said "I, of course, will insist upon that I did." He was going to insist that he paid me five hundred a month. He told some one in the District Attorney's Office that he was paying rent. I believe it was the time the Grand Jury investigation was going on. I have spoken of William R.

Johnson and I see him in the courtroom (indicating the defendant Johnson). That is [2 R. 62] the Johnson I have referred to during my testimony in regard to these real estate transactions, and with reference to these quit claim deeds to the property I have testified about here. That title to the property was taken in the name of Ted Goldstein and Homan and Abe Zimmerman, who took title in their names, were recorded by me and by me delivered to Johnson. The currency which I deposited in various amounts was in denominations from \$10.00 up to \$1,000.00. The denominations of the \$145,000 in currency which defendant Johnson brought into the Chicago Title & Trust Co. were some thousands, five hundreds, hundreds, tens and twentys, I guess. There were some \$100.00 bills in each instance.

Mr. THOMPSON. It is our desire to reserve cross-examination of this witness, and ask that he be instructed to return after we have had a chance to examine the many documents that have been referred to, all of these transactions that have been discussed here.

Mr. HURLEY. I object, if the Court please. Counsel here has been fully advised. He can examine the records. That is not a good ground.

Mr. THOMPSON. There is nothing in the bill of particulars regarding these transactions.

Mr. HURLEY. We mentioned the amount of money and certainly the amount of land.

The COURT. I didn't hear what you said.

Mr. THOMPSON. There is nothing in the bill of particulars regarding these transactions. This is the first knowledge I have had of all of these alleged transactions in the name of this man.

Mr. HURLEY. There is everything in the bill of particulars that the Court ordered; it complies with the Court's order.

The COURT. No. I think we will pursue the usual order. You may proceed with the cross-examination.

Cross-examination by Mr. THOMPSON:

I am a member of the law firm, Goldstein & Goldstein. The members are Isadore Goldstein and myself. There is one stenographer employed in the office and two lawyers, Clarence W. Shaver and William R. Peacock. There are no other people connected with the office in any way. I have no other business besides being a lawyer. I devote most of my time to the practice of law. With the rest of my time I [2 R. 63] publish a newspaper at Waukegan, Illinois. I devoted all my time to the practice of law in '37 and '38, up to the latter part of '39. When I was handling these transactions I was acting as attorney for Mr. Johnson. I consider him a friend, being friendly it was not a relationship between attorney and client; I didn't consider it that way. I just handled these transactions as a friend. I consider myself as having been a friend of Mr. Johnson for ten years or more, and the relation still continues to exist. There were four different transactions concerning the property on 97th and Western. An actual agreement as to the first transaction mentioned is E-27. Conveyance of the property was to be made by Isadore Goldstein, my law partner, and the second transaction, E-28, the conveyance was to be made to Isadore Goldstein. The

third transaction, evidenced by E-29, the conveyance was made to Isadore Goldstein. I did not take title to any of that property. The fourth transaction, E-30, conveyance was not made to me. Anna Homan took the title of the last property. I think the trust officer or escrow officer at the Chicago Title & Trust, wrote that Anna Homan in there. I do not know what "G. R." after her name means.

Q. Why did you have this stenographer take title to the fourth tract, whereas the other three were to your partner?

A. Well, they were adjoining property. My object was that if one party was trying to buy all that property that the price would be considerable more than what it was purchased for. I always took the title in the name of the nominee. Then after I consolidated it all I would issue one quit claim deed, but it is pretty hard to remember if that is what I did here. I couldn't remember the details of the transaction. I know there were deeds executed. That is all I could remember. I could not tell you definitely the detail about it. I do know who finally got title to the property. I believe that I recorded the deeds myself, or had the Chicago Title & Trust Co. record them. That is, I recorded the deeds or had conveyed the property to Mr. Johnson. The four tracts of land covered by the document we are talking about were, so far as I remember, conveyed to W. R. Johnson or William R. Johnson. My best recollection would be William R. Johnson. I did not say that I recorded the deed to each. I did not record the deed in that instance. I think I made

one quit claim deed to Mr. Johnson with respect to these four tracts we are now talking about. I think Anna [2 R. 64] Homan signed it. I am not sure about that. She was a single woman at that time. No, sir, she was married in between there sometime—I could not tell you just when. I do not remember whether my partner conveyed to Anna Homan or direct to Mr. Johnson—I do not recall. I do not recall if Mr. Johnson by these deeds that I drafted got title to all of this property. Naturally, if I see the deed I could explain it all in detail. My best recollection is that this property was conveyed to Mr. Johnson by deeds prepared by me and I delivered the deeds to Mr. Johnson. Whether the deed was executed direct by Ann Homan and Isadore Goldstein or whether or not Isadore Goldstein conveyed to Ann Homan and then to Johnson, or whether it was all of it or part of it I couldn't say unless I see the deed. I don't recall that offhand. I know there was some confusion about that particular piece of property—I mean on account of the transaction which involved four or five or six sellers. I don't recall. We tried to withhold information as to who was purchasing that particular property. I tried to withhold it for the purpose of trying to purchase it as cheap as I possibly could. I am not sure whether anybody else was interested in this particular piece of property, Mr. Thompson.

Q. When did you become uncertain about that, Mr. Goldstein?

A. I just happened to think at this moment.

Referring to defendant's Exhibit J-1, for identification, my recollection about whether or not

Mr. Johnson got title to this property is that he got an undivided one-half interest. I prepared that quit claim deed and it was acknowledged in my office. Clarence W. Shaver took the acknowledgment. That says that an undivided one-half interest was conveyed to William R. Johnson. Ann Homan and Raymond J. Homan, her husband, signed the deed. It covers Lots 38 and 39 in Bartlett's Beverly Highlands Subdivision, which are covered by the escrow agreement that is under Government's Exhibit E-30. I don't know whether I delivered this quit claim deed, Defendants' Exhibit J-1, for identification, to Mr. Johnson, or left it for him. I do not recall that particular instance.

Defendants' Exhibit J-2, for identification, conveys an undivided one-half interest to these lots to Mr. Johnson. The grantors are Ann Homan and Raymond J. Homan, who got title to this property through Isadore [2 R. 65] Goldstein, who quit claimed to them. They quit claimed a half interest to Mr. Johnson, and that deed covers Lots 31, 32, 33, 34 and 35, and those are the lots covered by escrow agreement identified as E-29, E-28 and E-27. That was acknowledged before William R. Peacock, a notary public in my office. He is an employee, as a lawyer, in my office. This deed was not delivered by me to Mr. Johnson. The two deeds pertaining to Western and 97th, I don't recall whether I left it for him or whether or not I delivered it in person.

I was a defendant in this indictment when it was returned and it was dismissed when this case was called for trial. I did not have any conversation with U. S. Attorney prior to the dismissal

of this indictment. I have talked to the U. S. Attorney three times about this case, after the dismissal. I had not talked to him about these matters in a general way many times before that. I am also a defendant in a pending indictment for perjury. I presume that relates to the investigation of this matter before the grand jury. That indictment is still pending as far as I know. I did not have any conversation with U. S. Attorney as to what disposition is going to be made of that indictment. He did not tell me that the disposition of that indictment will depend upon my performance in this case. We had no conversation whatsoever about the perjury indictment. Nobody representing the U. S. Attorney said anything to me about it. My lawyer has not told me anything about what the deal was. I have been attorney for William R. Skidmore for a good long while, who was also a defendant in this indictment before this case was called for trial. He was dismissed out of the indictment at the time it was called for trial. I have known William R. Skidmore twenty years. I have handled matters for him, I imagine, during that time. I do not recall as to how I became acquainted with Mr. Johnson. Skidmore may have introduced me to him.

Q. He is the man that owns the other half interest in this property out there that we have been talking about, at 97th and Western, isn't he?

A. As I remember it now, I think that is correct.

I guess that is right, but I made a quit claim deed to him for the other half.

Q. And, as a matter of fact, he is the one who brought the cash in to you, instead of Mr. Johnson, isn't he?

A. As I recall it, it was Mr. Johnson.

[2 R. 66] It is not true that Mr. Johnson knew nothing about this deal until after it was closed. As I recall it now, Mr. Johnson,—just to freshen was purchased, at 97th and Western, I believe Mr. Johnson sent the money down to me at the Chicago Title & Trust Co., with one of the gentlemen here. In that one instance, on that one or two lots, I don't remember. There was quite a number of transactions, and I just don't recall the details about it. I just didn't give the details of the particular transaction much thought. My recollection is that I made a deed to the half interest of this property and delivered it to William R. Skidmore. I did not say that my recollection is that Skidmore furnished me this cash to buy it. Skidmore did not furnish the money. Mr. Johnson sent it down to me. That is positive. I had a telephone conversation with Mr. Johnson and he told me he was sending a man down with that money to meet me at the Chicago Title & Trust Co. I remember that very distinctly. I did not have any telephone conversation with him about the second transaction. I saw him personally—I don't just recall where. He delivered that money to me in various amounts at various places on various days. It took us an hour and a half or two hours to count the \$145,000. Both of us were counting it. It was tens, twenties, fifties, hundreds, and that is quite a package. If you could count it any faster

I don't know. I imagine it took us an hour and a half—I can't recall the exact time.

I am almost certain I know Skidmore's handwriting. That is Mr. Skidmore's handwriting, Defendants' Exhibit J-3, for identification. That does not refresh my recollection as to any particular deal I had.

The amounts there of ten thousand and the nine thousand, are not identical with the amounts paid for the Dells property. I think the Dells property was more than ten and nine thousand. It was purchased subject to some taxes. My testimony up to this point is that it cost ten thousand and nine thousand. I know the amounts are on there, but I don't know what it is. I don't know if it is an escrow amount, the first deposit. I handled the money, yes, but I don't know whether I handled this particular money that is marked here. They are figures—that is all I know. I do not know that Skidmore handed me that amount of money that is there on that slip. That slip indicates that there was ten thousand of the twenty thousand dollars invested paid by [2 R. 67] somebody—I don't know what it is. I don't know that that is an accounting between Mr. Skidmore and Mr. Johnson with respect to the purchase of the Dells property. I don't know, but that may be so, that Mr. Johnson only owns half of the Dells property and only paid half of the price. Sam Hare is the gentleman who I knew that used to operate the place before it burned down. I don't know the Barrett who is mentioned on this slip. Lawyer Herman is the attorney that represented the seller, I believe. I presume the Goldstein mentioned in here is me.

There are other Goldsteins, however. I guess that the Goldstein that got \$750. out of this deal was me. Referring to Government's Exhibits, E-35 and 36, which are the two documents that I have already identified, the first one shows \$10,000 as the consideration for the first part of the Dells property, subject to all unpaid taxes, forfeitures, sales, etc. I did not mention all of them when I first testified. You did not ask me the question. And the second one shows \$9,000 for the second tract, subject to all unpaid general taxes, tax sales and tax forfeitures. I went over my testimony regarding the Dells property yesterday, and today with the U. S. Attorney, and the amount of money. That is all.

Q. Did you tell him that Skidmore owned half of these two pieces that I have talked about?

A. I don't remember that, Judge Thompson. I didn't remember that. I was of the opinion that Mr. Johnson owned it all. Had I remembered, I would not have said so.

MR. THOMPSON. If the Court please, that is all we know about this testimony up to the present and therefore we ask to reserve further cross-examination until we have had a chance to inspect the rest of these properties.

MR. HURLEY. I object to any reservation in that respect. If counsel wants to cross-examine this man he can do it now.

THE COURT. From what has been indicated in the opening statement of counsel this is going to be a long trial. It is going to be difficult for the jury and the court to follow the testimony. Accordingly I will have to ask you to cross-examine the witnesses as they are produced unless

some special reason arises or unless counsel agree. If you have any further cross-examination, cross-examine this witness now.

Mr. THOMPSON. If the Court please, we have no further information and if we get further information that bears on these matters we will want to call this witness again.

[2 R. 68] The COURT. All I am doing now is ruling you to proceed with the cross-examination if you have any, and you will do that.

Mr. THOMPSON. Well, we have no further cross-examination now. We have no further information with respect to the matter.

Re-direct examination by Mr. HURLEY:

When I was testifying on direct examination I did not have Defendants' Exhibits J-1 and J-2 before me, and I testified on cross-examination that a certain gentleman here in the courtroom delivered that first money for the payment of 9730 Western Avenue. That was Mr. Creighton, whom I identified here today.

(Thereupon Government's Exhibits E-69 and E-70 were offered and received in evidence, over the objection of the defendants, on the ground that they are immaterial and do not prove any issue in this case.)

APPENDIX B
WILLIAM R. JOHNSON

Statement of receipts and expenditures

Record citations	1932		1933		1934		1935		1936	
	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures
Balance forward	\$78,000.00		\$127,410.17		\$134,215.93		\$175,547.93		\$116,837.78	
<i>Items of cash receipts</i>										
Per Income Tax Returns (Govt. Exs. R-6-R-13)	70,677.54		74,667.81		116,214.53		57,878.88		161,892.74	
Additional (4 R. 47)	(415.56)		2,097.13		16,129.36		605.39		1,132.70	
Depreciation Allowed (Govt. Exs. R-6-R-13)	3,067.41		3,067.41		9,007.35		9,912.68		10,410.77	
Investments Recovered (3 R. 959-960, 970, 993; Govt. Ex. R-6)	289.45		2,083.51		4,015.91		5,076.18		7,466.37	
<i>Items of expenditure</i>										
Income Taxes Paid (Govt. Exs. R-90-R-104)		\$8,841.11		\$8,610.10		\$27,993.00		\$41,372.56		\$20,000.00
Payment of Mortgage—2141 So. Crawford Ave. (3 R. 972, 992)				5,000.00						
Payment of Mortgage—4020 Ogden Ave. (3 R. 972, 992)		500.00		8,500.00						
Purchase of Liberty Bonds (3 R. 976-977, 993)				5,000.00						
Lincoln Park Bldg.:						16,000.00				
Purchase of Equity (2 R. 12)										
Payment of 2nd Mtge. (2 R. 13, 15; Govt. Ex. E-9)		1,750.00		38,000.00						
Payment of 1st Mtge. (2 R. 36; Govt. Ex. E-12)						25,000.00		75,000.00		50,000.00
Delinquent Taxes (2 R. 430)						15,205.48				4,300.00
Improvements (Govt. Exs. R-8-R-13, E-16-E-20)						6,030.05		2,059.91		2,000.00
Furnishings (Govt. Exs. R-8-R-13, E-16-E-20)						3,076.40		3,453.81		2,000.00
Thorndale-Glenwood—Furnishings (Govt. Exs. R-8-R-13, E-21-E-25)						730.22		326.00		1,000.00
Albany Park Bank Bldg.—Purchase of (2 R. 3-4, 57)										
9730 So. Western Ave.:										
Purchase of land (2 R. 55-56, 118; 4 R. 8; Govt. Exs. E-27-E-30)										
Buildings (2 R. 75, 79, 83-84, 88-89, 117-118; 4 R. 8)										
Sunny Acres Farm:										
Purchase of (2 R. 60; 3 R. 982; Govt. Ex. E-31)										
Capital Items and Expenditures (3 R. 993; 4 R. 5-6, 10)										
Personal (3 R. 993; 4 R. 5-6, 10)										
Bon Air Catering Co.:										
Purchase of Property (2 R. 57-58; Govt. Exs. E-32-E-34)										
Improvements (2 R. 51, 54, 118; 3 R. 957, 983, 992; Govt. Exs. E-46-E-53)										
Curran Farm—Purchase of (2 R. 58-59; Govt. Exs. E-37, E-38)										
Columbian Gardens Real Estate—Deposit of Currency (2 R. 60-61; 3 R. 575-576; Govt. Ex. E-39)										
Du Page County Real Estate—Purchase of (2 R. 60, 3 R. 594, 982; Govt. Ex. E-41)										
The Dells—Purchase of (2 R. 59, 66-67; 3 R. 955, 992-993; Govt. Exs. E-35, E-36)										10,000.00
Loan to Wm. R. Skidmore (2 R. 411)		117.56								
Interest Paid (3 R. 993)		10,000.00		10,000.00		10,000.00		10,000.00		10,000.00
Living Expenses (3 R. 978)										
Balance on hand (3 R. 976) 12/31/1939										
		24,208.67		75,110.10		194,035.45		132,213.28		94,800.00
Balance forward		127,410.17		134,215.93		175,547.93		116,837.78		202,900.00
Totals	154,618.84	151,618.84	209,326.03	209,326.03	279,583.08	279,583.08	249,051.06	249,051.06	297,740.36	297,740.36

¹ Stated cash on hand Jan. 1, 1932 (2 R. 10).

² Stated cash on hand Dec. 31, 1939 (3 R. 976).

APPENDIX B

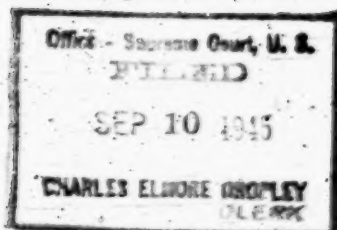
WILLIAM R. JOHNSON

Statement of receipts and expenditures

34	1935		1936		1937		1938		1939		Grand total	
Expendi- tures	Cash receipts	Expendi- tures	Cash receipts	Expendi- tures	Cash receipts	Expendi- tures	Cash receipts	Expendi- tures	Cash receipts	Expendi- tures		
	\$175,547.93		\$116,837.78		\$202,919.89						\$78,000.00	
	57,878.88		161,892.74		248,660.18		\$101,946.68		\$251,715.47		1,083,653.83	
	605.39		1,132.70								19,549.02	
	9,942.68		10,410.77		15,354.95		10,028.47		17,170.51		87,049.55	
	5,076.18		7,466.37		5,573.71		10,506.40		1,178.22		36,189.45	
\$27,993.00		\$41,373.50		\$20,062.18		\$78,550.70		\$128,399.72		\$34,530.91		\$348,361.31
												5,000.00
												9,000.00
												5,000.00
16,000.00												16,000.00
25,000.00		75,000.00		50,000.00								42,750.00
15,205.48												150,000.00
6,030.05		2,059.91		4,398.72		18,274.00		3,680.09		266.08		15,205.48
3,076.40		3,453.81		235.57		102.75		106.00		2,090.19		32,708.85
730.22		326.00		124.00		59,887.05						8,855.97
						13,115.00						1,388.97
						22,400.00						59,887.05
						145,000.00						13,115.00
						102,223.00		12,375.27		12,964.56		22,400.00
						3,238.14		3,002.49		4,645.44		145,000.00
						75,000.00		20,056.73				127,562.83
								273,940.93		274,847.34		10,885.77
										63,800.00		95,056.73
										17,500.00		548,788.27
												63,800.00
												17,500.00
												16,050.00
												22,115.90
												37,000.00
												1,397.58
10,000.00		10,000.00		10,000.00		10,000.00		10,000.00		10,000.00		80,000.00
												\$50,000.00
104,035.15		132,213.28		94,820.47		555,236.56		488,561.23		420,644.25		1,894,829.71
175,547.93		116,837.78		202,919.89		82,727.83		357,079.98		150,580.05		50,000.00
												50,000.00
279,583.08	249,051.06	249,051.06	297,740.36	297,740.36	472,508.73	472,508.73	131,481.25	131,481.25	270,064.20	270,064.20	1,304,441.85	1,304,441.85

* Red figures represent excess of expenditures over cash receipts and other cash resources.

FILE COPY



Nos. 115, 116

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945**

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

WILLIAM R. JOHNSON

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

**JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P.
KELLY AND STUART SOLOMON BROWN**

**ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 115

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIAM R. JOHNSON

No. 116

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P.
KELLY AND STUART SOLOMON BROWN

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the trial court (AR. 133) is not officially reported. The opinion of the Circuit Court of Appeals (AR. 207) is reported in 149 F. 2d 31.

Jurisdiction

The judgments sought to be reviewed were entered May 2, 1945 (AR. 237). The petition for writs of certiorari was filed June 6, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court on May 7, 1934.

Questions Presented

1. Whether the action of the Circuit Court of Appeals in examining the affidavits and other documents which comprised the only evidence offered in support of, and in opposition to, the motion for new trial in the light of the correct rule of law, after finding that the trial court in denying the motion had erroneously considered the evidence under inapplicable rules of law, requires review by this Court.

2. Whether under Rule 38, par. 1, petition for certiorari will be considered where the petition is accompanied by what is admittedly a certified transcript of only a small portion of the transcript of the record in the case.

3. Whether under Rule 38, par. 3, petition for certiorari will be considered by this Court where, without enlargement of time by order or stipulation, petition and purported printed record are thirteen days after filing delivered with demand for acknowledgment of service and fifty-five days after filing are delivered unconditionally.

Statement

On March 29, 1940, an indictment was returned against the respondents and others (Nos. 4 and 5, 1942 Term, pp. 2-25). The first four counts charged the defendant John-

son with wilful attempts to defeat and evade a large part of his income taxes for the calendar years 1936-1939, inclusive, and charged the co-defendants with wilfully aiding and abetting, etc., Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy (*Johnson v. United States*, 319 U. S. 503, 505-506).

Respondent Brown was found guilty on the last three counts. The other respondents were found guilty on all five counts. Johnson was sentenced to imprisonment for five years on each of the first four counts and two years on the fifth count, all to run concurrently; he was fined \$10,000 on each count with a provision that payment of one \$10,000 fine should discharge all fines. The other respondents were given lesser sentences and fines (*id.*, R. 462).

Chronology of Prior Reviews and Proceedings

The Circuit Court of Appeals for the Seventh Circuit reversed on the ground that the legal life of the grand jury had expired prior to the return of the indictment. *Johnson v. United States*, 123 F. 2d 111.

This Court, on writs of certiorari granted February 2, 1942, after argument April 10, 13, 1942 and reargument October 12, 1942, at this Court's direction addressed solely to the question of sufficiency of the evidence, on June 7, 1943 entered its judgment reversing and remanding the causes to the Circuit Court of Appeals "for proper disposition in accordance with this Court's opinion." *United States v. Johnson*, 319 U. S. 503.

Mr. Justice Frankfurter entered an order denying stay of mandate but without prejudice to the consideration and disposition by the court below of any motion filed under

Rule 2(3) of the Criminal Appeals Rules and any motion collateral thereto (R. 10).

On motion of the defendants and over objection of the Government, the Circuit Court of Appeals remanded to the District Court to permit motion for a new trial (R. 9-10). Motion for new trial was filed in the District Court on October 29, 1943 (R. 12).¹ The District Court, after hearing, filed an opinion concluding that the motion should be denied (R. 460-516) and entered its order accordingly (R. 534-536).

The Circuit Court of Appeals filed an opinion (R. 578-586) holding the trial court had not abused its discretion and entered judgment of affirmance accordingly May 6, 1944 (R. 586).

Respondents filed a petition for certiorari (Nos. 153 and 154, 1944 Term) which the Government opposed.

While the petition was pending respondents asked the Solicitor General to investigate a report that William Goldstein (the Government witness whose false testimony was the primary basis of the motion for new trial) had recently filed amended and delinquent income tax returns for the years 1937-1943 on behalf of his son in which were included the income and deductions on a building (the Albany Park Bank Building) at 3424 Lawrence Avenue which Goldstein had testified at the trial he had bought for Johnson at Johnson's request with Johnson's money. Thereupon and on October 3, 1944, the Solicitor General filed in this Court a supplemental memorandum admitting that,

"In the returns filed [by Theodore Goldstein, son of William Goldstein] the rents from the building

¹ A complete analysis of the grounds of the motion and of the evidence upon which it was based is set out in the defendants' brief in support (R. 19-34).

were reported as income and deductions were taken for depreciation and expenses." ²

After referring to circumstances under which the returns were allegedly filed the Solicitor General concluded:

"These reported actions and statements of Goldstein, as to which we have not consulted him, are not inconsistent with his trial testimony. . . . He did not testify that Johnson was the owner of the building nor that the money Johnson gave him to purchase it belonged to Johnson." ³

On motion of respondents, this Court deferred consideration of the petition conditioned upon the prompt filing in the Circuit Court of Appeals for the Seventh Circuit of a

² The Government had already recognized the probative weight of deductions in tax returns (Gov't. Br. on Rearg., Nos. 4 and 5, 1942 Term, p. 95):

"Again, the ownership and sale of real estate would be indicated by deductions for real estate taxes, etc., and by the termination of such deductions."

In the return for 1940, from his salary of \$2600 from another source, T. Goldstein deducted the net operating loss on the building, \$1,631.08, attributable to excess of real estate taxes and depreciation over the income of \$900 on the building, and so reduced his taxable net income to \$968.92 (AR. 59-60). In each of the returns the depreciation schedule showed date of acquisition as July, 1937, the month in which Goldstein purchased the property (AR. 48, 52, 56, 60, 64, 68, 72).

³ The trial judge summarized Goldstein's testimony as follows (R. 512):

"Goldstein testified on the trial that he purchased the property for Johnson and paid for it with currency given him by Johnson; that he took title in the name of his son Ted Goldstein and subsequently caused a quit-claim deed to be delivered to Johnson."

The testimony to which the trial judge thus referred is as follows (R. 145):

"I was requested by Mr. Johnson to go out there and purchase the building for him. . . . I purchased that property at the request of Mr. Johnson. . . . Title to that property was taken in the name of Ted W. Goldstein, my son. Subsequently there was a quit-claim deed delivered to Mr. William R. Johnson by my son. This Albany Park Bank Building property was purchased July 15, 1937."

motion to reopen proceedings on the motion for new trial and until the disposition of that motion (AR. 18-19).

The Circuit Court of Appeals, on November 16, 1944, on motion of defendants and over objection of the Government, vacated its order affirming the order of the District Court denying defendants' original motion for new trial and remanded to the trial court (AR. 18-19). The pending petition in this Court having thus become moot, it was dismissed on motion of counsel for the defendants (323 U. S. 806).

The trial court, on motion of respondents (AR. 23-25) and over opposition, required the Government to produce the income tax returns in question (AR. 26-27). Respondents then filed an amended motion for new trial (AR. 28-34) in which the record on appeal from the trial court's denial of defendant's original motion for new trial was made an exhibit and incorporated by reference (AR. 29). There was thus included in the amended motion for new trial the original motion for new trial with all its supporting affidavits. Respondents also relied on the fact that the returns of Theodore Goldstein procured and filed by William Goldstein demonstrated not only that the latter had testified falsely at the trial with respect to the purchase of the Albany Park Bank Building but showed as well that his affidavits filed by the Government in opposition to the original motion for new trial contained deliberately false statements.

The trial court, after hearing, entered its opinion and order denying the motion (AR. 133, 171). The opinion considered the evidence solely under the rule that motion for a new trial on the ground of newly discovered evidence bearing on the guilt or innocence of a defendant (as distinguished from evidence bearing on the fairness of the defendants' trial) will be granted only when the newly discovered evidence is not merely impeaching or merely cumu-

lative in character and if *added* to the record *would probably result in a verdict of acquittal on new trial* (AR. 136, 167). The trial court made no reference to the rule formalized in *Larrison v. United States*, 24 F. 2d 82, 87 (C. C. A. 7)⁴ and now acknowledged by the Government to be applicable to motions for new trial based upon a showing of false testimony (Pet., pp. 49-50).

On the appeal from the order denying the amended motion for a new trial the Circuit Court of Appeals, holding inapplicable the rule of *Berry v. State*, 10 Ga. 511, expressly accepted as controlling by the trial court, carefully considered all the evidence including the affidavits presented on the first motion and the income tax returns and affidavits submitted for the first time in support of the amended motion for new trial. It held (AR. 225):

"In our considered judgment Goldstein testified falsely at the trial and has been so thoroughly discredited that his affidavits offered in opposition to the motion for a new trial carry little, if any, weight. Proof therein contained affords no substantial support for a finding that he testified truthfully at the trial."

And it concluded (AR. 227):

"It is our conclusion that the proof offered in support of the original and amended motion, with the attending circumstances, *unerringly* points to the fact

⁴ The rule as thus stated by the Seventh Circuit in that decision is as follows:

"* * * a new trial [because of false testimony] should be granted when

(a) The court is reasonably well satisfied that the testimony given by a material witness is false.

(b) That without it the jury *might* have reached a different conclusion.

(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not learn of its falsity until after the trial."

that Goldstein's trial testimony was false. The finding of the trial court to the contrary was, in our judgment, an abuse of discretion."

Applying the rule of the *Larrison* case, the court found all of the requisites thereunder to be present. Its careful opinion also sustains its holding that there was no lack of diligence (AR. 230).⁵

Detailed Discussion of Facts Is Improper on Petition

It is unnecessary here to enlarge upon the facts as stated in the opinion of the Circuit Court of Appeals, nor is it appropriate herein to enter into the necessary correction of the statement of facts by the Government, consisting as it does of a highly argumentative exposition of the Government's interpretation of the evidence founded in many instances upon inaccurate or incomplete statements of the testimony of witnesses. Clearly the evidence in the case merely presents its individual problems of relevance, inference, and persuasiveness. Neither could any substantial benefit be now derived from such corrections since the record upon which such corrections must ultimately rest, even if it were otherwise properly here, has not been furnished in the number of printed copies necessary to supply the individual justices.⁶ As the case stands the Government seeks to have the petition for certiorari decided upon its representation of the facts and such additional appreciation thereof as may be gleaned by the justices only from the certified copies of the records in the office of the Clerk.

⁵ In closing, the Circuit Court of Appeals also noted the error of the trial court involved in rejecting the evidence as cumulative because it went to matters as to which there was evidence at the trial. In so doing it emphasized that even under the rule of *Berry v. State*, 10 Ga. 511, purportedly applied by the trial court, evidence in support of a new trial is rejected on that ground only where it is merely cumulative.

⁶ See Point II (c), *infra*, p. 25.

The False Testimony Was Highly Material

It is important here only to point out that despite the tardy effort made by the Government, not so much by direct statement as by implication, to show that the testimony of William Goldstein was in any event not material (Pet. 9-11, 15, 17, 18), such testimony was an essential element in the case. Indeed the trial court stated (AR. 138):

"The ownership of these various properties was a subject of lively interest on the trial."

Goldstein was the Government's principal witness on the ownership of all of these properties and its only witness on some of them, notably the Albany Park Bank Building. And the Circuit Court of Appeals in its opinion states (AR. 209):

"That Goldstein's testimony was material and, if false, was highly prejudicial to the defendants, is *not in dispute*." (Emphasis supplied.)

The Government apparently seeks to create the impression that its case was sustainable on two independent and unrelated theories, (1) the ownership theory—that Johnson owned and operated gambling houses as a unit and derived winnings therefrom on which he attempted to evade income tax payments, and (2) the expenditure theory—that Johnson's cash expenditures during each of three of the four years covered by the indictment were in excess of his available cash resources and reported income (Pet. 10, 18).

This is contrary to the contention of the Government in this Court. In its original brief on the merits here, the Government said (p. 5):

"Moreover, the court erred in assuming that the so-called 'ownership' and 'expenditure' theories were wholly independent of each other. They were not. Each gave support to the other."

And in its brief on reargument the Government said (p. 5):

"The 'ownership' and the 'expenditure' theories are thus not separate and distinct branches of this case. It is erroneous, we submit, to attempt to isolate each theory, and to search the record for support of each. The correct approach is to consider them together, since each offers substantial support for the other."

This Court treated the two theories as being interrelated, holding (319 U. S. 503, 517):

"That he [Johnson] had large, unreported income, was reinforced by proof which warranted the jury in finding that certainly for the years 1937, 1938, and 1939, the private expenditures of Johnson exceeded his available declared resources."

Goldstein's testimony was material under both theories.—Furthermore, even if the premise of two independent theories were valid, the Government's contention is bad.

Materiality under ownership theory.—The Government states (Pet. 10):

"The testimony of Goldstein, now held to be false by the Circuit Court of Appeals, had little bearing on this, the 'ownership theory' of proof, which turned on the issue of the proprietorship of gambling houses."

This statement does not square with the contentions made in the Government's brief on reargument in this Court in which it relied heavily on Goldstein's testimony in developing the so-called "ownership" theory. In that brief under the heading "The Operation of the Gambling Houses as a Unit" (p. 9), the Government stated (pp. 27, 29-30):

"From June 1936 to July 1938 banking transactions of the Horseshoe, Lincoln Tavern, D & D Club and

⁷ The Government thus sought to avoid the point that mere ownership without more was inadequate proof since Johnson was shown to have reported and paid tax on income of over \$800,000 during the four years in question.

Harlem Stables were handled at a single currency exchange, the Albany Park Currency Exchange, through a single account. * * * [Gov't Br. on Rearg., p. 27.]

"In July 1938 all of this business was taken away from the Albany Park Currency Exchange (2 R. 477-478). Sommers at this time told the owner of the Albany Park Exchange that the respondent Brown was getting the business (2 R. 477). Brown opened the Lawrence Avenue Currency Exchange near the Albany Park Exchange in July 1938 (2 R. 478, 532). Sommers, Hartigan and Kelly stated to revenue agents that they cashed checks at the Lawrence Avenue Exchange (2 R. 459, 463, 468). The Lawrence Avenue Exchange carried all of this business as a single account. * * * [Gov't Br. on Rearg., pp. 29-30].

In the same brief on reargument at page 30 and under the heading "The Ownership of Johnson" the Government stated:

"Johnson was shown to be the owner [sic] of the building in which Brown's currency exchange, the Lawrence Avenue Currency Exchange, was located (2 R. 56-57. [The record reference is to Goldstein's testimony as to the purchase of the Albany Park Bank Building.] This latter building was purchased by Johnson on July 16, 1937 (2 R. 57). [This record reference again is to Goldstein's testimony as to the purchase of the Albany Park Bank Building.]"

Materiality under expenditure theory.—The Government's patently absurd attempt (Pet. 15) to minimize the importance of the Goldstein testimony, without which Johnson would not have been charged with enormous personal expenditures which he denied having made, does not merit discussion here. If the Court is interested in an analysis of the charged expenditures, an accurate discussion of them is found in the record (R. 20-23).

Without stopping now to detail the inaccuracies in the

government's computation, it is sufficient to note that the invalidity of this contention as to immateriality of the false testimony is apparent from the fact that Johnson directly, categorically, and completely denied the truth of Goldstein's testimony with respect to all of the properties involved about which there is any controversy. (Nos. 4 and 3, 1942 Term, pp. 955-957). But for Goldstein's testimony, therefore, the jury would not have been authorized, as it was, under the charge of the trial court, to disregard all of the defendant Johnson's testimony. The trial court instructed the jury that it was at liberty to disregard all the testimony of any witness if it believed any of its testimony to be false (id., pp. 1006). In view of the clear conflict either Johnson or Goldstein lied. The jury could not believe Goldstein without believing Johnson's testimony to be at least in part false. Therefore, believing Goldstein, the jury was at liberty under the charge to reject all of the defendant Johnson's testimony. The prejudicial effect of this fact cannot be gainsaid in view of this Court's statement in its opinion (319 U. S. 503, 516):

"* * * During the course of his extensive testimony, Johnson himself put simply and completely the only real problem before the jury when he swore that he 'never had any financial interest in any gambling club operated by any of the defendants.'

"The jury decided this central issue against Johnson."

"If the jury had believed Johnson, and it cannot be denied that they *might* have done so in the absence of the conflict of Goldstein's testimony, they would clearly have reached a different result. That false testimony presenting a square contradiction of a defendant's testimony, in a case in which the "*Falsus in unus, falsus in omnibus*" charge is given, is prejudicial to the extent of requiring a new trial is well

established. *Pettine v. New Mexico*, 201 Fed. 489, 493 (C. C. A. 8); *State v. Mounkes*, 91 Kan. 653, 138 Pac. 410, 411, cited with approval in *Martin v. United States*, 17 F. 2nd 973, 976 (C. C. A. 5).

Applicable here to the Government's attempt to now minimize the effect of Goldstein's testimony is the statement of Mr. Justice Van Devanter in *Miller v. Oklahoma*, 149 Fed. 330, 339 (C. C. A. 8):

"When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

As stated above, respondents perceive no benefit to the court or themselves in advancing here a counter-argumentative statement as to the evidence in the record and the propriety of the inferences to be drawn therefrom. This Court has not been furnished with a complete duly authenticated copy of the transcript upon which this case was decided by the court below and an adequate number of copies thereof for the use of the individual justices. It would therefore be impossible for the court even to reach an informed judgment on the merits of any such argument.

Argument

I

REASONS FOR REFUSING WRIT

The Government's statement of the question presented is so vague and general that it can hardly be deemed to comply with the provision of Rule 38, par. 2, that the court will consider "only the questions specifically brought forward by the petition." Cf. Hart, *Supreme Court—1937 and 1938 Terms*, 53 Harv. 579, 594. Significantly, the Government fails to set forth any "Specification of Errors Intended to be Urged" which would serve to point out the rulings specifically challenged. While specification is not by the rules required in a petition for certiorari but only in the supporting brief, if any (Rule 27, par. 2(e), 38, par. 2), in this case the Government has combined both petition and supporting brief in one document. Their absence here plus the vaguity of the stated Reasons for Granting the Writ confirms the impression that the Government is here merely seeking another review of the facts, in a record now constituting many thousand pages.

1. The first "Reason for Granting the Writ" is patently inadequate.—This Point (Pet., pp. 41-49) is confined largely to representations and argumentations as to inferences properly to be drawn from the evidence. The closest it comes to concretely setting out any purported reason for granting the writ is contained in the statement (Pet., p. 42):

"The decision is [a] based on so serious a departure from the accepted course of review of the granting or denial of motions for new trial, and [b] in the process discloses so great a misapprehension of the significance of the material presented, [c] that it casts an unwarranted reflection upon the conduct of the case and

[d] opens the way to indefinite prolongation of criminal proceedings."

(a) The alleged "departure from the accepted course of review" is not developed. This apparently refers to "Reason No. 2" considered below.

(b) "So great a misapprehension of the significance of the material presented" by the court below is not recognized by this Court as a reason for granting a writ. This is a familiar complaint but this Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U. S. 220, 227; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 509; *General Pictures Co. v. Electric Co.*, 304 U. S. 175, 178.

(c) Aside from its novelty as a ground for certiorari, the assertion that the decision "casts an unwarranted reflection upon the conduct of the case" is manifestly ill-founded. The reflection upon the conduct of the case by the Government arises, not from the decision of the Circuit Court of Appeals but from the record made. The Circuit Court of Appeals surely is not responsible for the fact that the prosecution, after indicting Goldstein for perjury in protecting his client Skidmore, then indicted him with Johnson but dismissed as to him on the day the case was called (AR. 210). Neither is the court responsible for, and probably the prosecution did not anticipate, Goldstein's implicating statement, "My lawyer has not told me anything about what the deal was" (AR. 210). The Court of Appeals decision is not responsible for the fact that after almost five years the perjury indictment against Goldstein still goes untried (AR. 210). Neither is the court responsible for the record fact that the prosecution has both before and after this Court's decision interceded to block Bar Association investigation of Goldstein's perjury in this case (AR.

210). Certainly the Circuit Court of Appeals cannot be held responsible for the cynicism inherent in the filing of bills of particulars in indictments against the respondents other than Johnson, charging them to be the owners of the very gambling houses here asserted to have been owned by Johnson.⁸

Neither is the opinion of the Circuit Court of Appeals responsible for the statement of the Solicitor General to this Court (Supp. Mem. Oct. 3, 1944, p. 4):

"These reported actions and statements of Goldstein, as to which we have not consulted him, are not inconsistent with his trial testimony."

This representation by the Solicitor General was made at a time when the Government had in its possession the affidavit, made *ante litem motam* August 11, 1944, of its own officer, Wodrick, swearing that as to the Albany Park Bank Building Goldstein had said (AR. 104):

"he did not know who owned that property * * * that he received money from persons unknown for the purchase of that building." (Emphasis supplied)

The picture is not a pretty one, but the record is of the prosecution's making and cannot now be erased.

(d) That the case "opens the way to indefinite prolongation of criminal proceedings" is a glittering generality without foundation. Admittedly, a long period has ex-

⁸ In separate criminal proceedings against Sommers, Indictment No. 32154; Hartigan, Indictment No. 32155; and Kelly, Indictment No. 32156 (now pending in the United States District Court for the Northern District of Illinois, Eastern Division), and while the instant case was pending on the merits in the Supreme Court, the Government filed Bills of Particulars, charging specifically that these defendants were the real owners, not merely nominal owners or agents for Johnson, of the gambling houses, and that they as the real owners, received as personal income the very same income from those houses which in this case Johnson is charged with having received and failed to pay a tax upon.

pired since the trial of respondents but the Circuit Court of Appeals opinion (AR. 229) adequately shows that respondents have been at no time guilty of dilatory tactics. If the Solicitor General refers to the time necessary for new trial under the order of the Circuit Court of Appeals, then it is apparent that his assertion of "disservice to the cause of administration of the criminal law" arises from a radical misconception of the fundamental objective of the criminal law, a confusion of the means with the end. Certainly, in view of this Court's persevering vigilance to protect the right to a fair trial, and against errors that affect the "fairness, integrity or public reputation of judicial proceedings" (*United States v. Atkinson*, 297 U. S. 157, 160; *Johnson v. United States*, 318 U. S. 189, 200), this contention cannot be entertained here.

Flagrant misstatements by the Government.—We cannot forego pointing out some of the more glaring misstatements of the Government set out under this Reason for Granting the Writ.

Misrepresentation as to Goldstein's testimony as to the Albany Park Bank Building.—The Government purports (Pet., p. 42) to have set out the nature of Goldstein's testimony concerning the Albany Park Bank Building at pages 10-20. Reference to the cited pages shows only one reference to the Albany Park Bank Building (p. 13). The Government's purported resumé of Goldstein's testimony as to the building (Pet., pp. 12, 42-43) distorts Goldstein's testimony as to the building by generalizing it with his testimony as to other properties.

But like most false witnesses, Goldstein made a misstep.

Although his testimony as to all the other properties was so careful and so uniform as in itself to create cause for suspicion, when he testified as to the Albany Park Bank Building he said (R. 517-518):

"I was requested by Mr. Johnson to go out there and purchase the building *for him*." (Emphasis supplied.)

The trial court summarized this as follows (R. 512):

"Goldstein testified on the trial that he purchased the property for Johnson and paid for it with currency given him by Johnson."

As said by the Circuit Court of Appeals (AR. 211):

"It is difficult to discern how Goldstein could have any more definitely placed the ownership of this property in Johnson."

Much of the evidence, particularly the tax returns, was addressed to demonstrating the falsity of these statements. The Government contended not merely that Goldstein's trial testimony placed ownership of the Albany Park Bank Building in Johnson but it asserts that Goldstein's statement referred to in the affidavit of Blockus on the original motion for new trial "was in effect an assertion that Johnson owned the building" (Pet., p. 32).

Misrepresentation as to admission by Johnson's counsel.

—The Government asserts (Pet. 44-45):

"the building in question was described by Johnson's counsel in his opening statement at the trial as having been bought by Johnson. . . . These statements of Johnson's counsel, though later argued to be erroneous, were made in Johnson's presence and never corrected during the trial."

It is not true that these statements of Johnson's counsel were not corrected at the trial. The Government is flatly contradicted by the record. At the trial Johnson testified (Nos. 4 and 5, 1942 Term, p. 955):

"I do not own the Albany Park Bank Building or any part of it, and I did not employ Goldstein to buy the property for me and never gave him any money to

make the purchase and no deed was ever delivered to me by him."

Johnson's counsel in his brief in the Circuit Court of Appeals on the merits fully explained his inadvertent and erroneous misstatement (R. 334, note). It was not relied upon at the trial, nor on appeal or in this Court in review of the case on the merits. This explanation is referred to in the Petition at page 23, but is ignored by the Government when the reference to it is reiterated and heavily relied upon (Pet. 30, 32). Aside from this timely retraction of the "admission," it is important to note that no admission by Johnson's counsel could in any event bind the other defendants.

2. The second stated Reason for Granting the Writ is frivolous.—As we understand it, the Government under this Point (Pet. 49) agrees that the rule stated in the *Larrison* case (*supra*, p. 7) is correct and is the applicable test where motion for new trial is based on proof of false testimony (Pet. 49-50). For it states, "We should have no quarrel with an extension of that rule to a case where there has been a clear and convincing showing of perjury, found by the trial court." The Government argues in effect that the applicability of the rule depends upon the quantum and degree of conclusiveness of the evidence. The quantum in any particular case will, under the rule, obviously determine the result in that case. But plainly the quantum of the evidence cannot determine the rule to be applied. Indeed, in the *Larrison* case itself, the court applied the rule to affirm denial of a new trial because the evidence was found insufficient.

² If the quantum determines the rule to be applied, and the Government concedes its proper application in cases of recantation, it can hardly object to its application here for it is well-recognized that a formal affidavit of recantation by a self-confessed perjurer is the most unreliable of all testimony. *Harrison v. United States*, 7 F. 2d 259, 262 (C. C. A. 2); *Dale v. United States*, 66 F. 2d 666 (C. C. A. 7); *People v. Shiletano*, 218 N. Y. 161, 112 N. E. 733.

The only semblance of allegation of error of law—entirely unsupported by citation—appears in the Government's contention (Pet., pp. 50-51) that the court below made—

“a preliminary departure from recognized practice in undertaking to review *de novo* the affidavits submitted to the trial court and on that basis reversing the trial court's finding.”

The Government adds that this violates the rule that the trial court shall be vested with “responsibility for determinations of fact” on motions for new trial.

The Government, however, does not deny, in fact its quotation from Judge Barnes' opinion (Pet., p. 39) shows, that he was governed in his consideration of the evidence by the rule of the *Berry* case. That rule, as the court below held, obviously has no application where false testimony is the ground of the motion for new trial. The trial court's reasoning and pivotal conclusion that, under the rule of the *Berry* case, each and every item of defendants' evidence “is excluded from the classification ‘newly discovered evidence warranting a new trial’ ” (AR. 167), cannot reasonably be urged to constitute findings or a conclusion by that court under the controlling but radically different rule of the *Larrison* case as to the admissibility and sufficiency of the evidence to justify a new trial.

Insofar as the admissibility or sufficiency of the evidence under the rule of the *Larrison* case was concerned, that question was necessarily decided by the appellate court as a matter of first impression and its decision was within the court's power. Had the court not done so it would have been required to employ the time-consuming procedure of a remand to the trial court for his reconsideration of the evidence in the light of the correct rule of law. Cf. R. S. Sec. 701, 28 U. S. C. Sec. 876 (made applicable to Circuit Courts

of Appeals by the Act of March 3, 1891, c. 517; Sec. 11, 26 Stat. 826; *Ballew v. United States*, 160 U. S. 187, 201; *Realty Co. v. Montgomery*, 284 U. S. 547, 550; *Cole v. Ralph*, 252 U. S. 286, 290. The court below did not substitute its findings for those of the trial court. It made findings because no findings under the applicable rule of law had been made by the trial court. This is perhaps not important because where, as here, the record is entirely documentary, it is the clear duty of the reviewing court in any event to examine the record and determine for itself the meaning of the written evidence. As pointed out by Robert L. Stern, *Review of Findings of Administrators, Judges and Juries*, (1944), 58 *Harv. L. Rev.* 70, 112-113:

"But where the evidence is entirely documentary or otherwise undisputed, the appellate court is in as good a position as the trial judge to determine the facts and to draw inferences of fact."

(See also *id.*, pp. 111, 114.) The discussion of this point is elaborately documented with supporting authorities. This has long been the rule in the Seventh Circuit. *Uihlein v. General Electric Co.*, 47 F. 2d 997; *Chain O' Mines v. United Gilpin Corp.*, 109 F. 2d 617; *Himmel Brothers Co. v. Serrick Corp.*, 122 F. 2d 740. It has been given the same application in cases where the relief involved was discretionary. *Nashua Mfg. Co. v. Berenzweig*, 39 F. 2d 986 (citing *Elbers et al. v. Chicago Printed String Co.*, 39 F. 2d 315); *Corica v. Ragen et al.*, 140 F. 2d 496. It is equally applicable in cases involving review of action on motions for new trial. *Hamilton v. United States*, 140 F. 2d 679, 681 (App. D. C., 1944), reversing *Hamilton v. United States*, 31 A. 2d 887 (see dissenting opinion, p. 891); *Arbuckle v. United States*, 146 F. 2d 657 (App. D. C., 1944).¹⁰

¹⁰ The Government (Pet. 51) also apparently objects to the Circuit Court of Appeals' statement that it would have been improper for the trial court to weigh the demeanor of Goldstein as a witness against affidavits.

No other errors of law are even purportedly suggested by the Government. The discussion (Pet. 51-53) as to the sufficiency of the evidence to justify a new trial under the rule applicable when false testimony is *not* shown is manifestly beside the point and is not directed to a ground of decision. However, respondents do not waive their contention that, even under this rule, a new trial was required.

3. The third stated "Reason for Granting the Writ" is merely repetitious.—We are unable to understand precisely what it is the Government is driving at in its point III (Pet. 53). It appears to be merely a restatement of its reiterated contention that the court below wrongly construed the record and that this Court should intervene to re-review that record solely for the purpose of re-evaluating the evidence. This redemonstrates the basic misconception of the scope and purpose of the certiorari jurisdiction upon which the petition is founded.

presented by defendants and made by persons whom the court had not seen or heard. But this is addressed to a contention made by the Government in opposing defendants' appeal and was not a ground of decision though obviously correct.

The trial court did not purport to take into account the demeanor of Goldstein as a witness in evaluating the affidavits of the many affiants for defendants (AR. 133-169), and defendants in their assignment of errors (AR. 190) assigned no error on that ground. The language of the majority opinion is addressed to the contention of the Government adopted by Judge Minton in his dissent (AR. 231). It is not a ground of decision. The Government's suggestion (Pet. 51) that no request for testimony was made and objection that there was no remand for the taking of oral testimony is therefore a tilting at its own strawman. If such remand had been made, then the Government might have had just cause to complain of the unnecessary prolongation of these proceedings.

II

BREACH OF THE RULES OF THIS COURT REQUIRES DISMISSAL
OF THE PETITION

The petition for writs of certiorari should be dismissed for two reasons:

1. **The petition is not accompanied by a certified transcript of the record in the case.**—Rule 38, par. 1, of this Court provides:

“A petition for review on writ of certiorari of a decision of a state court of last resort, a circuit court of appeals, or the United States Court of Appeals for the District of Columbia shall be accompanied by a *certified transcript of the record in the case*, including the proceedings in the court to which the writ is asked to be directed.” (Emphasis supplied)

Here the petitioner has not filed a certified transcript of the record in the case as required by Rule 38, par. 2; and under that rule the petition was not filed in time.

(a) **The clerk's certificate does not purport to certify the entire transcript.**—The so-called printed record “AR”, being the only record served on respondents, contains merely a certificate of the Clerk of the Seventh Circuit as to the correctness of the copy of the opinion and judgment of the Circuit Court of Appeals. The only other certificate appearing in the transcript filed with the Clerk of this Court (not printed) is attached to a copy of the book to which the Government refers in its brief as “AR” and certifies merely:

“that the foregoing *printed* pages contain a true copy of the printed record, filed on the fifth day of February, 1945 in” etc. (Italics supplied)

This certificate does not certify that the printed volume is a true and complete copy of the transcript of record in the case and it is not.

(b) **It is admitted that the certified transcript is incomplete.**—Reference to the certificate of the Clerk of the District Court (AR. 205, 206) and to the praecipe to which it refers (AR. 188) discloses that this volume so certified by the Clerk of the Circuit Court of Appeals is but a small part of the record made in the District Court and certified to the Circuit Court of Appeals, and on which was based the judgment of the Circuit Court of Appeals here sought to be reviewed. That the certified transcript is only part of the complete transcript is admitted by the Government in its petition. Footnote No. 1 on page 1 of the Government's petition reads:

"The record in this case consists of three separately printed records, the original record in this Court on review of respondents' convictions (Nos. 4 and 5, 1942 Term); the record made on respondents' petition for certiorari for review of the judgment of the Circuit Court of Appeals affirming the action of the District Court in denying respondents' subsequently filed motion for a new trial (Nos. 153 and 154, 1944 Term); and a record of additional proceedings on respondents' amended motion for a new trial. The first record on the motion for a new trial will be referred to by the designation 'R.' and the record of additional proceedings on the amended motion by the designation 'AR.' Reference to the original record on review of respondents' convictions will be shown by record references to Nos. 4 and 5, 1942 Term."¹⁰

¹⁰ This Court accepts as the record only the copy duly authenticated by the clerk of the court below—not the mere statement of a party as to what constitutes the record. *Ray v. Law*, 3 Cr. 178, 179; See *Campbell v. Reed*, 2 Wall. 198.

The only part of the above which was certified by the clerk of the court below and filed by the Government in this proceeding is the volume designated in the footnote at "AR."

(c) **The Government's incorporation by reference in violation of the Rules defeats the main purpose of certiorari practice.**—Obviously petitioner has violated Rule 10, par. 3, made applicable by Rule 44 in that it is asking this Court to incorporate by reference the printed records in Nos. 4 and 5, 1942 Term, and the printed record in Nos. 153 and 154, 1944 Term. And this in the absence of any certificate from the clerk of the court below that such printed documents are a part of the record in this case. Superficially, this might be classified as a technical, although not unimportant, violation of this Court's rules in view of the fact that these printed records were a part of the record in this case in the court below (AR. 8). In fact, however, the seriousness of this attempt to incorporate this material by reference rather than to furnish printed copies of it to the court as required by Rule 38, par. 7, lies in the fact that the Justices will not have immediately available portions of the record upon which the Government relies in the petition. This applies particularly to the printed record in Nos. 153 and 154, 1944 Term (Vol. 3 of the Bill of Exceptions herein, AR. 8).¹¹ Even casual examination of the petition discloses that the 41-page "Statement" is almost entirely taken up with a highly controversial discussion of the evidence based largely upon reference to the evidence contained in record ("R.") of which only a single copy is on file in this Court. Without a copy of the record ("R.") itself no Justice of this Court could do more than form an impression as to the de-

¹¹ It is of negligible importance so far as the record in Nos. 4 and 5, 1942 Term (Vol. 2 of the Bill of Exceptions herein, AR. 8) is concerned as no controversial reference to the evidence in that record is likely (cf. stipulation, particularly paragraph (a), AR. 593-594).

gree of the intensity of the Government's disagreement with the views expressed by the court below. He could arrive at no informed conclusion as to whether such disagreement had any evidentiary support.¹²

(d) Important portions of the record are neither certified nor on file in this Court.—The failure to file any certificate as to the completeness of the transcript might in some cases be merely technical, to be corrected by withdrawal of the record for the purpose of refileing it with a proper certificate. In this case, however, it conceals the deliberate and inexcusable failure of the Government to file vital portions of the record as required by Rule 38.

It has been respondents' contention throughout the proceedings on the motion for new trial and the amended motion for new trial that the proceedings on respondents' motion for remand which preceded the motion for new trial contained an independent basis for reversing the trial court's denial of these motions (and an independent basis for affirming the court below in its reversal of the trial court). These proceedings were a part of the record on both motions (see R. 554 and stipulation, paragraph (c), AR. 593-594). *The record of these proceedings is not even on file in this Court* nor are volumes IV-VII of the Bill of Exceptions herein (AR. 8-10).

(e) In the absence of a prima facie valid transcript certiorari for diminution does not lie.—Rule 10, par. 2 (made

¹² Rule 38, par. 7, contemplates that this Court shall be furnished with ten printed copies of the record. Respondents under the procedure adopted by the Government will clearly be deprived of the privilege presently extended to other respondents to have the petition individually considered by all of the participating Justices of this Court. See Testimony of Mr. Justice Van Devanter in Hearing Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 68th Cong., 1st Sess., on S. 2060 and S. 2061, February 2, 1924, at 29. Frankfurter & Landis, *The Supreme Court under the Judiciary Act of 1925* (1928), 42 Harv. L. Rev. 1, 11.

applicable by Rule 44 to petitions for certiorari as far as may be) provides for the filing with the clerk of the lower court of praecipe and counter-praecipe or of a stipulation of the parties if the size of the transcript is to be reduced. (Cf. Robertson, Practice and Procedure in the Supreme Court (rev. ed.) p. 31.) The result is that the certificate of the clerk will ordinarily show either (1) that the transcript is a "full, true and correct copy of the entire record" of the case (cf. *Missouri, Kansas & Texas R. Co. v. Dinsmore*, 108 U. S. 30, 31), or (2) that the transcript was prepared on praecipe or on stipulation.

Either form of certificate would constitute at least *prima facie* proof that this Court has a lawful transcript before it. *Meyer v. Mansur & Tebbetts Implement Co.*, 85 Fed. 874, 875-876. The certificate here does neither. It merely certifies the correctness of the copy of the printed record filed February 5, 1945, and in no manner purports to constitute the entire transcript of proceedings in the cause. The cover of this printed record indicates that the complete transcript was filed earlier on January 15, 1945. Therefore there has not been filed in this Court even a *prima facie* valid transcript which might be remedied by certiorari for diminution. *Meyer v. Mansur & Tebbetts Implement Co.*, *ubi supra*; cf. *Mo. Kansas & Texas R. Co. v. Dinsmore*, *ubi supra*, with *Hodges v. Vaughan*, 19 Wall. 12. Nor is this a case of inability of the petitioner to obtain a duly certified transcript. Cf. *In re Summers*, Sup. Ct. U. S., June 11, 1945 (89 L. ed. 1304, 1305).

The Government, by its petition apparently seeks a review of the decision of the court below involving a reexamination by this Court of the evidence to determine the propriety of its holding that the denial of new trial was an abuse of discretion by the trial court. The Government has thus arbitrarily chosen a portion of the record that it wishes the members of this Court to have before them in passing

on the petition for certiorari. But, as this Court has said (*Railroad Co. v. Schutte*, 100 U. S. 644, 647):

“it will not do to permit the appellant or the plaintiff in error to make up a record to suit himself, without any regard to the wishes of his opponents or the rules and practice of the court.”

It is the clear duty of the petitioner to see to it that the record is properly presented (cf. *Railway Co. v. Stewart*, 95 U. S. 279, 285) and when as here the clerk does not certify that the copy is the complete transcript of the record in the cause the petition should be dismissed. *Davis v. Harper*, 14 App. D. C. 298, 303. This Court will assume that the parts of the record not certified here were adequate to support the judgment of the Circuit Court of Appeals. Cf. *Hanson v. Boyd*, 161 U. S. 397, 407; *Zimmerman v. Harding*, 227 U. S. 489, 496; *Cooper v. Dasher*, 290 U. S. 106, 108; *Hagner v. United States*, 285 U. S. 427, 433.

It is not to be supposed that the underlying objective of dispatch in criminal cases is lightly to be nullified by failure to file a copy of the record as contemplated by the rules. Certainly, expedition in such cases is not to be defeated by condoning the overt breach of every rule of this Court looking to the presentation in this Court of the record contemplated by the rules governing certiorari procedure. Here the purported record is certified neither as constituting the full transcript of the record nor as containing the necessary parts thereof as designated by the parties.¹³ Even should the Court be disposed to overlook the violation of its rules and grant the petition upon mere conjecture as to its merits, the Court could hardly overlook the fact that

¹³ The practice of considering petition for certiorari on appendices bears no relation to the procedure adopted here. It will be recalled that the form of stipulation used by the Government in such cases recognizes the necessity of having the entire transcript of record in the lower court filed with this Court at the time the petition for certiorari is considered.

the cause could not be ripe for action on the merits, even after the granting of the petition, until a complete record was filed.

2. The petition for certiorari was not served on respondents as required by the Rules of this Court.—A further example of the cavalier manner in which the Government flouts the rules of this Court appears in the delay in service in this case. Rule 38, par. 3 of the Rules, provides:

“Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the Court, or a justice thereof when the Court is not in session), and due proof of service shall be filed with the clerk.”

The petition was filed on June 6, 1945. More than ten days thereafter, and without order of this Court or stipulation of counsel, oral or written (see Robertson, *Practice and Procedure in the Supreme Court* (rev. ed.) p. 53), the Solicitor General on June 19 proffered a copy of the petition and purported record with a demand for acknowledgment of service. This was rejected and a subsequent delivery similarly conditioned upon acknowledgment of service was also rejected. On August 1, copies of the petition and purported record were finally unconditionally delivered and delivery (but not due service) was acknowledged.

Particularly in a criminal case where the applicable rules are permeated with the objective of dispatch (see *United States ex rel. Coy v. United States*, 316 U. S. 342, 345; Memorandum from the Dep't of Justice, Sen. Rep. No. 627, 72d Cong., 1st Sess. (1932) 3; 52 Harv. L. Rev. 983) where no reason for delay has been suggested to counsel for respondents or to this Court, there would seem little excuse for deliberate disregard of the Rules of this Court.

Had the Government filed a printed petition for certiorari in time and within two or three days thereafter served such petition, this case might well have been disposed of by a prompt brief in opposition or waiver of the right to file a brief ¹⁴ before the end of the term. ¹⁵ Instead, the printed petition was not filed or proffered until one day after this Court had adjourned. In view of the renewed reiteration by the Government in its petition of the long period that has elapsed since verdict and judgment in these cases, it is important to note that the delay over the summer is attributable directly to the tardiness and breach of the Rule of this Court by the Government.

The inept manner in which the Government presents the petition in plain violation of all the rules of this Court, if countenanced, not only would give weight to the view that the scales are balanced in favor of the Government and against the individual but would in itself and by way of precedent in future cases seriously impair the benefit of the certiorari practice by preventing this Court from reaching an informed judgment as to the probable merits of the case before acting on the petition. Reference to the letter of August 1, 1943, addressed to counsel for defendants by the Honorable Harold Judson, Acting Solicitor General, and

¹⁴ Cf. *Bratcher v. United States*, No. 1369 O. T. 1944; pet. for certiorari filed June 12, 1945; Gov't Br. in Opp. waived; cert. den. June 18, 1945. *Di Melia v. Bowles*, No. 1374 O. T. 1944; pet. for certiorari filed June 14, 1945; Gov't Br. in Opp. waived; cert. den. June 18, 1945.

¹⁵ It is to be noted that the only printing involved was the printing of the petition and the thirty-one pages containing the opinion and proceedings in the Circuit Court of Appeals (R. 207-238), both of which were in final form and not subject to editorial emendation. The Government has not even suggested printing of the record as a cause for its delay and probably in sincerity could not. In view of the expedited service which the Solicitor General is able to command in the Government Printing Office and which has often been exemplified in the filing of briefs in opposition, there would appear to be no serious question as to the ability of the Government to obtain a print of the petition filed June 6, within ten days thereafter.

by him filed with the Clerk of this Court leaves no doubt that the Government does not choose to pay even lip service to the Rules of this Court. In that letter the Government takes the flat position that the rules binding on private litigants in this Court may be disregarded by the Government and that resulting record defects must be corrected by the private party at the peril of having this Court determine the case on a partial record arbitrarily selected by the Government.

Conclusion

The petition not only fails to bring forward even the semblance of any reason recognized as moving this Court to grant certiorari but is presented in flagrant violation of the Rules of this Court.

Wherefore, it is respectfully submitted the petition should be denied.

September, 1945.

HOMER CUMMINGS,

*Attorney for William R. Johnson,
Jack Sommers; James A. Hartigan,
William P. Kelly and Stuart Solomon
Brown, Defendants.*

WILLIAM J. DEMPSEY,

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A. Hartigan, William P. Kelly and
Stuart Solomon Brown, Defendants.*

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Nos. 115-116

Office - Supreme Court, U. S.

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CHARLES ELMORE CROPLEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA,

Petitioner

v.

WILLIAM R. JOHNSON

THE UNITED STATES OF AMERICA,

Petitioner

v.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P.
KELLY and STUART SOLOMON BROWN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS.

HOMER CUMMINGS,

*Attorney for William R. Johnson,
Jack Sommers, James A. Hartigan,
William P. Kelly and Stuart Solomon
Brown, Respondents.*

WILLIAM J. DEMPSEY,

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Stuart Solomon Brown, Respondents.*

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Respondents' answer

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
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BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the circuit court of appeals (AR. 207) is reported in 149 F. 2d 31.

JURISDICTION.

The judgments sought to be reviewed were entered May 2, 1945 (AR. 237). The petition for writs of certiorari was filed June 6, 1945, and was granted October 8, 1945 (AR. 239). The jurisdiction of this Court rests on Section

240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court on May 7, 1934.

STATEMENT.

On March 29, 1940, an indictment was returned against the respondents and others (1 MR. 2-25).¹ The first four counts charged the defendant Johnson with wilful attempts to defeat and evade a large part of his income taxes for the calendar years 1936-1939, inclusive, and charged the co-defendants with wilfully aiding and abetting, etc., Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy (*United States v. Johnson*, 319 U. S. 503, 505-506).

Conviction and Review.

After a trial lasting more than 6 weeks, from August 27 to October 12, 1940 (2 MR. 1, 3 MR. 152), respondent Brown was found guilty on the last three counts. The other respondents were found guilty on all five counts. Johnson was sentenced to imprisonment for five years on each of the first four counts and two years on the fifth count, all to run concurrently; he was fined \$10,000 on each count with a provision that payment of one \$10,000 fine should discharge all fines. The other respondents were given lesser sentences and fines (R. 462).

¹ References to the printed records are as follows:

The original printed record on review of respondent's convictions Nos. 4 and 5, O. T. 1942: MR....., indicating volume and page.

The printed record on petition for certiorari (dismissed) to review judgment of the Circuit Court of Appeals affirming order denying original motion for new trial Nos. 153 and 154, O. T. 1944: R.....

The printed record of the additional evidence and proceedings on the amended motion for new trial: AR.....

The Circuit Court of Appeals for the Seventh Circuit reversed on the ground that the legal life of the grand jury had expired prior to the return of the indictment. *United States v. Johnson*, 123 F. 2d 111 (September 15, 1941).

On writs of certiorari granted February 2, 1942, after argument April 10, 13, 1942, and reargument on October 17, 1942 (at this Court's order May 4, 1942, addressed solely to the question of sufficiency of the evidence) this Court on June 7, 1943, entered its judgment reversing and remanding the causes to the circuit court of appeals "for proper disposition in accordance with this Court's opinion." *United States v. Johnson*, 319 U. S. 503.

Proceedings for New Trial.

First remand.—On motion of the defendants and over objection of the Government, the circuit court of appeals remanded to the district court to permit motion for a new trial (R. 9-10).²

First motion for new trial.—Motion for new trial was filed in the district court on October 29, 1943 (R. 12).³ The district court, after argument, filed an opinion concluding that the motion should be denied (R. 460-516) and entered its order accordingly (R. 534-536).

The circuit court of appeals filed an opinion (R. 578-586) holding the trial court had not abused its discretion and entered judgment of affirmance accordingly May 6, 1944 (R. 586).

² Mr. Justice Frankfurter's order of denial of stay of mandate pending petition for rehearing was specifically stated to be "without prejudice, however, to the consideration and disposition by the United States Circuit Court of Appeals for the Seventh Circuit of any motion filed under Rule 2(3) of the Criminal Appeals Rules" (R. 10).

³ A complete analysis of the grounds of the motion and of the evidence upon which it was based is set out in the defendants' brief in support (R. 19-34).

Respondents filed a petition for certiorari (Nos. 153 and 154, 1944 Term) which the Government opposed.

On motion of respondents, this Court deferred consideration of the petition conditioned upon the prompt filing in the Circuit Court of Appeals for the Seventh Circuit of a motion to reopen proceedings on the motion for new trial and until the disposition of that motion (AR. 18-19).

Second remand.—The circuit court of appeals, on November 16, 1944, on motion of defendants and over objection of the Government, vacated its order affirming the order of the district court denying defendants' original motion for new trial and remanded to the trial court (AR. 18-19). The pending petition in this Court having thus become moot, it was dismissed on motion of counsel for the defendants (323 U. S. 806).

Amended motion for new trial.—The district court, on motion, required the United States to make available the tax returns of Theodore Goldstein (AR. 26). Respondents then filed an amended motion for new trial (AR. 28-34) in which the record on appeal from the trial court's denial of defendants' original motion for new trial was made an exhibit and incorporated by reference (AR. 29). There was thus included in the amended motion for new trial the original motion for new trial with all its supporting affidavits. Respondents also relied on the fact that the returns of Theodore Goldstein procured and filed by William Goldstein, discovered while the case was pending in this Court demonstrated not only that the latter had testified falsely at the trial with respect to the purchase of the Albany Park

⁴ On October 3, 1944, at the request of defendants the Solicitor General filed with this Court a Supplemental Memorandum in which he admitted that Goldstein, the Government witness whose testimony is under attack, had filed income tax returns on behalf of his son in which the latter had reported as his income and claimed as deductions, respectively, the income and expenses including depreciation of a building which Goldstein at the trial had testified he had bought for Johnson with money given him by Johnson, with title being taken in his son's name and by the latter deeded to Johnson (Gov't App'x A, p. 120).

Bank Building but showed as well that his affidavits filed by the Government in opposition to the original motion for new trial contained deliberately false statements (AR. 33, 47-74).

The trial court, after argument, filed its opinion holding the rule of law governing consideration of the case to be that stated in *Berry v. State*, 10 Ga. 511, and entered its order denying the motion (AR. 133, 171).

The trial court made no reference to the rule formalized in *Larrison v. United States*, 24 F. 2d 82, 87 (C.C.A. 7),⁵ and now acknowledged by the Government to be applicable to motions for new trial based upon a showing of false testimony. (Br. 83).⁶

On the appeal from the order denying the amended motion for a new trial the circuit court of appeals, holding inapplicable the rule of *Berry v. State*, *supra*, expressly accepted as controlling by the trial court, and holding the rule in *Larrison v. United States*, *supra*, to be applicable, carefully considered under that rule all the evidence including the affidavits presented on the first motion and the income tax returns and affidavits submitted for the first time in support of the amended motion for new trial. It held (AR. 225):

⁵ The rule as thus stated by the Seventh Circuit in that decision is as follows:

"... a new trial [because of false testimony] should be granted when

(a) The court is reasonably well satisfied that the testimony given by a material witness is false.

(b) That without it the jury *might* have reached a different conclusion.

(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not learn of its falsity until after the trial."

⁶ The Government contends now that the rule is not applicable except in cases of recantation or where the evidence of false testimony is "clear and convincing". It overlooks the fact that in the *Larrison* case where the rule was formulated, the evidence of perjury was found to be insufficient, the court holding that the rule required denial rather than granting of the motion, but that the legal basis for evaluating the evidence was to be found in the rule without regard to whether the ultimate conclusion was to grant or deny.

"In our considered judgment Goldstein testified falsely at the trial and has been so thoroughly discredited that his affidavits offered in opposition to the motion for a new trial carry little, if any, weight. Proof therein contained affords no substantial support for a finding that he testified truthfully at the trial."

And it concluded (AR. 227):

"It is our conclusion that the proof offered in support of the original and amended motion, with the attending circumstances, *unerringly* points to the fact that Goldstein's trial testimony was false. The finding of the trial court to the contrary was, in our judgment, *an abuse of discretion*." (Emphasis supplied.)

Applying the rule of the *Larrison* case the court found all of the requisites thereunder to be present. Its careful opinion also sustains its holding that there was no lack of diligence (AR. 230).¹

Facts Upon Original Trial.

The facts developed upon the trial of these cases are set out in the briefs filed in this Court in Nos. 4 and 5, 1942 Term, particularly the briefs on reargument. We will not in this brief again set those facts out at length. For convenience, however, the contentions based upon them will be stated.

Government's theory.—The Government charged defendant Johnson with being the real owners of the D & D Club operated by the co-defendant Kelly, the Horseshoe and the Dev-Lin operated by defendant Sommers, and the Harlem

¹ In closing, the circuit court of appeals also noted the error of the trial court involved in rejecting the evidence as cumulative because it went to matters as to which there was evidence at the trial (AR. 166). In so doing it emphasized that even under the rule of *Berry v. State*, 10 Ga. 511, purportedly applied by the trial court, evidence in support of a new trial is rejected on that ground only where it is *merely* cumulative.

Stables and the Lincoln Tavern operated by defendant Hartigan. Johnson denied owning these gambling clubs, and Kelly, Sommers, and Hartigan, respectively, claimed to be the owners as well as the operators of them (2 MR. 462; 3 MR. 809-811, 812, 878, 887). Defendant Brown operated a currency exchange in the Albany Park Bank Building which was patronized by Kelly, Sommers, and Hartigan. The Government contended that this currency exchange was the "financial headquarters" of defendant Johnson's gambling operations conducted through the co-defendants. Johnson denied having any connection whatsoever with the Lawrence Avenue Currency Exchange, or any interest in the Albany Park Bank Building in which it was located. Brown and Hartigan claimed to be joint owners of the currency exchange and denied that it was a part of any unified gambling operation of the co-defendants or of Johnson.

All of the Government's testimony purporting to show that the gambling operations of the co-defendants were part of a unified enterprise and that Johnson was the owner of the enterprise was admittedly circumstantial. No direct evidence of receipt of any income from these operations by defendant Johnson was offered by the Government. The Government's evidence showed that Johnson reported about \$800,000 in taxable income and paid taxes of some \$350,000 on it during the years covered by the indictment (3 MR. 763-764).

An important issue at the trial was whether Johnson was chargeable personally with large expenditures for certain properties. It was on the basis of testimony of Goldstein, then, and even now, under indictment for perjury to protect his client Skidmore, that Johnson was charged with expenditures as the sole owner of the Bon Air Country

Club and adjacent properties, the "Dells" property, and the property at 9730 Western Avenue rather than as half owner with Skidmore as Johnson testified. It was also upon the basis of Goldstein's testimony that \$7500 and \$10,000 deposited as escrows preliminary to purchase of properties and \$59,000 for the purchase of the Albany Park Bank Building were charged as expenditures by him rather than as by Skidmore.

In the circuit court of appeals in seeking the affirmance of the court below on the merits the Government contended that the evidence justified Johnson's conviction upon two theories—(1) the "expenditure theory" (which did not involve the co-defendants) and (2) the "ownership theory" which did involve them: The "expenditure theory" was an attempt to create a variant of the so-called "net worth" method of proving receipt of income. The "net worth theory" briefly stated is that if a comparison between a man's proven net worth at the beginning of a tax period and his proven net worth at the end of the tax period shows an increase in net worth, that increase may be attributed (with certain qualifications) to receipt of taxable income in the amount of the difference. The Government's expenditure theory is based upon evidence allegedly showing that the total of Johnson's personal expenditures during the period January 1, 1932, through December 31, 1939, exceeded the combined total of his assets on January 1, 1932, and his reported income for the years 1932 through 1939, both inclusive. Through the device of arbitrarily distributing this excess in arbitrary amounts as attributable to unreported income for the years 1937, 1938 and 1939, and designating the tax returns for 1932 through 1936 as being true and accurate, the Government produced a tabulation (Gov't Br., App'x B) reflecting these assumptions and thereby seeming to show that Johnson's unreported income

based on excess expenditures must have been received in the years 1937, 1938 and 1939.⁵

The "ownership theory" refers to the contention that the gambling operations of the co-defendants were part of a single unified enterprise, that Johnson was the real owner of that enterprise and that it constituted a source of large income. The theory does not, as its name might imply, relate to ownership of real property. The controversy as to the ownership of real property (with the exception of the Albany Park Bank Building) involved only the issue of how much money Johnson had spent during the years in question. The amount of his expenditures, however, was material and important to the Government's case under both the "expenditure theory" and the "ownership theory".

The method by which the Government sought to show that Johnson had made "large" expenditures "in excess of his stated resources" in order to prove both its "ownership" and "expenditure" theories, was as follows: The Government first introduced through testimony of Internal Revenue Agent Wilson (R. 10) an alleged admission of defendant Johnson to the effect that on July 1, 1932, his total available cash resources amounted to \$78,000. It then introduced his income tax returns for the years 1932 through 1939. It introduced evidence, including testimony of the witness Goldstein, to show expenditures purportedly made by Johnson during the period January 1, 1932, through December 31, 1939. The Government then, through its expert witness Clifford totaled separately the items of

⁵ The circuit court of appeals did not in its opinion advert to the question of whether the essential element in a net worth case, namely, proof of net worth at the beginning and end of each of the tax periods involved in the respective counts, could be found in the evidence in the original trial record. And this Court in its opinion did not suggest that the "expenditure" evidence standing alone would support a conviction but characterized it as reinforcing evidence offered to show Johnson owned the gambling houses operated by the co-defendants.

expenditure and the items of income as shown by Johnson's returns plus the \$78,000, and compared the two totals. This comparison allegedly showed that the expenditure total exceeded the total of reported income and cash assets by some \$474,000 (3 MR. 742; Gov't Br. 22).

The Government conceded that Johnson's income-asset total should be increased by some \$36,875 which reduced the deficit to some \$437,000 (Brief on Reargument in this Court, p. 109). The Government has admitted that another item amounting to \$37,000 should be deducted from Johnson's alleged expenditures (R. 21). This item involved a loan which Johnson admitted he had made to William R. Skidmore but testified had been repaid in the year in which it had been made.

In addition there is a \$16,500 item which ought also to be eliminated from this total. This item involves payments for the purchase of an equity and certain second mortgage bonds (See R. 21).

On the basis of Goldstein's testimony Johnson was charged with being the sole owner of the Bon Air Country Club and adjacent properties, including the Curran Farm, "The Dells," and the 9730 Western Avenue property. Johnson admitted a one-half ownership in these properties. He would have been charged with personal expenditure of \$393,815 on the basis of a one-half ownership instead of some \$787,630 as sole owner had it not been for Goldstein's testimony (see Gov't Br. App'x B).⁹ Johnson denied any interest in the \$7,500 and \$10,000 escrow deposits and in the Albany Park Bank Building. He would not have been

⁹ The Government contends in its brief that Goldstein's testimony as to Bon Air only involved the purchase price (Br. 23) whereas the major portion of the expenditure involved was for improvements which amounted to some \$600,000. It neglects the point that only on the basis of assuming full ownership in Johnson, could the entire, rather than half, the cost of the improvements be charged to Johnson. The contention that Johnson was the sole owner can only be based on the Goldstein testimony. See Gov't Br. App'x B, citing only "T R. 57-58".

charged with some \$77,387 as owner of these items had it not been for Goldstein's testimony. The total of these amounts, \$471,200, therefore would not have been charged against him had it not been for Goldstein's testimony, and at the close of the Government's evidence Johnson would have had a comfortable balance of some \$90,000 to his credit rather than almost \$500,000 in alleged personal expenditures which could not be explained by recourse to his reported income tax returns. Johnson's testimony showed an additional net expenditure of some \$50,000.¹⁰

Concededly Goldstein's testimony was the cornerstone of the Government's so-called "expenditure" theory. That he was a most important witness in support of its "ownership" theory is demonstrated by the fact that in the portion

¹⁰ It is only by treating Johnson's testimony not as a net admission of \$50,000 but as unrelated statements and relying on (1) his admission of additional uncharged expenditures of some \$200,000 and ignoring (2) his claim of uncredited assets of approximately \$150,000 that the Government and Judge Barnes (R. 513-514) are able to charge \$200,000 rather than \$40,000 additional to Johnson on the basis of his testimony. It is important to recognize that up until the time Johnson made the admission of net expenditures of more than \$40,000, the Government had no evidentiary basis for its expenditure theory without the Goldstein testimony.

Johnson's admissions were purely voluntary. Although they did not result in establishing expenditures in excess of reported income in any year they did obviously tend to damage his case by reducing the amount by which his total reported income exceeded his admitted expenditures. That such admissions were against his interest must have been obvious to him as well. Therefore, the fact that he made them is a strong indication of his truthfulness.

The Government asserts that its evidence of excess expenditures by Johnson in the amount of \$474,349.54 plus additional expenditures admitted by Johnson in the sum of \$200,000 and less certain adjustments reflected a total of \$640,387.86 as the excess of Johnson's expenditures over his available declared cash resources (Gov't Br. 22). \$640,387.86

- A. Because Johnson's admission of approximately \$200,000 of additional expenditures was only part of a net admission against interest of about \$50,000 or \$60,000 (he claimed his assets at the beginning of the accounting period, January 1, 1932, were \$140,000 or \$150,000 in excess of the \$78,000 admitted by the Government (3 MR. 960) there should be deducted, at least, \$140,000.00 (Johnson's claim that at the commencement of the accounting period in 1932 he had between \$140,000 and \$150,000 (3 MR. 960) in addition to the \$78,000 was confirmed by the testimony of Edward H. Wait showing that during the dog-racing season of 1931 he and Johnson received together \$9,000 a week for five or six months (3 MR. 904) representing a return on Johnson's

of the Government's Brief on Reargument in this Court dealing with Johnson's "ownership" of the co-defendants' gambling houses, the Government opens and closes with Goldstein's testimony. (See footnote R. 48-49.)

Its contention that he had received more taxable income than he had reported reads:

"The showing that Johnson had expended large amounts of money in excess of his stated resources fortified the conclusion that he was the owner of the gambling houses with which he had been identified. And the evidence of his participation in the affairs of the gambling houses made reasonable the conclusion that his large expenditures were made from in-

initial investment of \$100,000 and Wait's of \$50,000 in 1927. See also admission of Clifford concerning amount of income reported for 1927 through 1931 inclusive (3 MR. 746)).

B. Johnson was charged with the full amount as purchase price of an equity (\$16,000) and certain second mortgage notes (\$45,000) (3 MR. 748), purchased from Tavalin who admitted Johnson got a discount but was hazy as to amount (2 MR. 13, 15; 25). Johnson, the only witness who testified as to the exact amount of the discount, stated he had paid only \$7,500 for the equity and \$22,000 for \$30,000 of notes (3 MR. 957). His expenditures were therefore \$16,500 less than the face amount charged to him by the Government. \$16,500

C. On account of a loan which Johnson stated (2 MR. 411) he had advanced to Skidmore, he was charged with an expenditure in 1938 of \$37,000 (3 MR. 764). Johnson testified the loan had been repaid in the same year in which it was made (3 MR. 984). The Government offered no evidence whatsoever to show the loan had not been repaid. Therefore this amount could not properly be charged to Johnson as an expenditure indicating unreported income. See also R. 21 where it is pointed out that the Government did not give Skidmore credit for the loan in computing his excess of expenditures over and above reported income and cash on hand. This could be justified only by a recognition that Skidmore had repaid the loan in 1938. \$37,000

D. The total by which the amounts of expenditures charged against Johnson on claim that he was sole owner of properties testified to by Goldstein should be reduced on the basis of uncontradicted motion evidence of actual ownership..... 471,200 \$664,700.00

Minimum excess of resources and reported income over expenditures.....

\$24,312.14

come that was derived from his ownership of the gambling enterprises." (Gov't. Br. in Supreme Court, Nos. 799, 800, 1941 Term, p. 51.)

Materiality of Goldstein's testimony.—The Government relied for its proof of Johnson's alleged ownership of the Albany Park Bank Building (important in its "proof" of Johnson's ownership of the gambling houses operated by the co-defendants) upon its witness William Goldstein (2 MR. 57). It also relied heavily on the testimony of William Goldstein (2 MR. 55-68) for its proof of Johnson's alleged large expenditures "in excess of his stated resources."

The Government cannot now deny what is asserted vigorously in its brief on reargument (Br., Nos. 4 and 5, 1942 Term, p. 5) that the Goldstein and other expenditure testimony furnished "strong support" for the conclusion that Johnson was the owner of the gambling houses operated by the co-defendants and was offered for that purpose. And as the Government points out in its brief (Br. 12) this Court, on the basis of that contention, concluded that the expenditure testimony of which the Goldstein testimony was by far the most important had the effect of reinforcing this conclusion.

*Facts Upon Which Original Motion for New Trial
Was Based.*

Defendants' motion for a new trial was supported by newly discovered evidence proving that Goldstein testified falsely on material matters. The motion was predicated primarily upon the claim that the submission of the case to the jury on a record containing Goldstein's false testimony was so prejudicial to all of the defendants that they were deprived of a fair trial and that they are therefore entitled to a new trial upon legal and proper evidence (R. 13).

Goldstein's false testimony related to ten items of property referred to in these proceedings as the "Bon Air" and its four related properties, the "Curran Farm," the "Green House," "White House," "Gas Station" (2 MR. 57-58), the "Dells" property (2 MR. 59), "9730 Western Avenue property" (2 MR. 56; 63-64), the "\$10,000 escrow" (2 MR. 61), the "\$7,500 escrow" (2 MR. 61), and the "Albany Park Bank Building" (2 MR. 56-57). *With respect to each of these items other than the two escrow items Goldstein testified that he had purchased the properties at Johnson's request with currency given him by Johnson and as to all save the two escrow items had caused quit claim deeds therefor to be given Johnson (id., supra).*

Johnson denied that he had arranged with Goldstein or given Goldstein any money for the purchase of any of these properties, and testified that he had acquired a half interest in the first seven of them from Skidmore, having agreed in advance of Skidmore's purchase of the "Dells" and 9730 Western Avenue properties to do so (3 MR. 955, 973), but not having known of Skidmore's proposed acquisition of any of the other five—Bon Air and related properties—until after Skidmore had purchased them (3 MR. 955). With respect to the remaining three items—two escrows and the Albany Park Bank Building—Johnson testified that he had never given Goldstein any money to purchase or to make a deposit toward the purchase of the properties in question, that he had no interest whatsoever in any of them and that he had never received a deed or any other evidence of ownership concerning them (3 MR. 955, 957, 977 et seq.).

Theory of Proof of Goldstein's False Testimony.

Goldstein's testimony that Johnson on various occasions, at various unspecified times, privately gave him various sums of money to purchase the properties involved can be directly disputed only by Johnson who, according to Goldstein, is the only other person able to testify of his own knowledge concerning the transactions. Johnson denied that any of the transactions took place. To support Johnson's denial defendants offered evidence showing that he had no motive or interest to make this particular denial, and other evidence to corroborate him and to demonstrate his general reliability under oath. Defendants also offered evidence to show that Goldstein had two powerful incentives to testify falsely; first, to protect himself, and secondly, to protect his friend and client Skidmore. The first motive was demonstrated by showing that prior to taking the witness stand Goldstein obtained a dismissal of the indictment charging him with aiding and abetting Johnson in the evasion of income taxes; that at the time he took the stand he was under indictment for perjury and free on bail; that, shortly after he testified, he was permitted to draw down the bail money and remain at large on his own recognizance and that he is still, over five years later, at large, never having been brought to trial on the perjury indictment. Defendants proved further that Goldstein had an additional motive to file false affidavits reaffirming in part his trial testimony for use by the Government on the motion and amended motion for new trial. This additional motive is found in the fact that only through the offices of the United States Attorney has Goldstein been able to prevent a hearing on disbarment charges, the hearing having been twice postponed at the intervention of the United States Attorney (the disbarment charge filed by Johnson is based on the

claim that Goldstein testified falsely at the trial of this case).

With respect to Goldstein's motive to protect Skidmore, defendants proved that Goldstein for many years prior to the trial was Skidmore's close friend and attorney and that at the time of the trial he was counsel of record for Skidmore in a criminal income tax case and in a companion civil case. The record shows that Skidmore, at the same time as Goldstein, obtained a dismissal of the indictment charging him with aiding and abetting Johnson in evading taxes. Skidmore's own tax case was based on the contention that increases in his net worth during the years 1936, 1937 and 1938 proved he had received taxable income in excess of his reported income. The evidence proves that at the time the grand jury instituted an investigation of Skidmore's tax evasion Skidmore and Goldstein took steps to conceal the fact that Skidmore had acquired the various properties involved in Goldstein's testimony and that he owned 50 per cent of seven of them and 100 per cent of the three remaining items. The Government charged Goldstein with perjury to protect Skidmore in his tax case and formally indicted him on this perjury charge (this is the perjury indictment referred to above). Goldstein's testimony clearly had the effect of concealing Skidmore's interest in these properties to Skidmore's benefit in his criminal case and to his substantial benefit in the companion civil case. At Skidmore's later criminal trial he was convicted but the Government was not able to buttress its case by showing in addition to other property acquisitions Skidmore had acquired the properties here involved.

Defendants also proved that Goldstein admitted on numerous occasions that he had testified falsely at the trial in the instant case. These admissions were made under circumstances precluding any possibility of collusion for

the purpose of obtaining a new trial for Johnson. In addition defendants proved many statements and actions by Skidmore completely irreconcilable with his trial testimony. Defendants also proved that Goldstein is an unreliable witness under oath by showing numerous false statements in affidavits made by him and submitted on the amended motion for new trial.

The evidence of Skidmore's acquisition and ownership of the properties involved, directed to the issue of the falsity of Goldstein's testimony and proving a compelling motive on his part to testify falsely, also demonstrates that Johnson was improperly charged on his trial with huge expenditures not reconcilable with his reported income. It demonstrated that he did not make some of the expenditures charged to him at all and that other expenditures charged should be reduced by 50 per cent.

Defendants also proved the effective abandonment of the ownership theory of the Government by showing that after this case had been submitted finally to this Court on re-argument, the Government charged the co-defendants with being the owners of the gambling houses operated by them and with having received as their own taxable income all of the alleged income of these houses. Any contention that Johnson received this income therefore can no longer be made. On this basis defendants' position is that in addition to proving that their trial was an unfair one and that therefore they are entitled to a new trial, the motion also demonstrated quite apart from the question of Goldstein's false testimony that on a new trial the jury would probably acquit rather than convict (The Court of Appeals, finding that the evidence proved Goldstein's falsity beyond any question, did not consider the question whether without regard to falsity a new trial would probably result in a verdict of acquittal).

Trial Court Opinion.

This proof was deemed insufficient by the trial court. It held the rule of *Berry v. State*, 10 Ga. 511, to be "the rule of law that governs the court in its consideration of the present motion" (R. 464-465). Applying that rule to the evidence it held (R. 514):

"each and every such item [of allegedly newly discovered evidence now proposed by the defendants to be presented to a jury] is excluded from the classification "newly discovered evidence warranting a new trial" by at least one of the elements of the rule of law applying in such cases and above stated. All but a few items are merely cumulative of other like items presented at the trial. * * * The movants have not been diligent as to these items. All items which are not merely cumulative, are merely impeaching. * * * The movants have not been diligent as to these items."

Much of the proof on the motion for new trial was offered to show that in the first group, the Bon Air and adjacent properties, the Dells and 9730 Western Avenue properties, were owned 50 per cent. by Skidmore and that the second group, two escrows and Albany Park Bank Building, were owned 100 per cent by Skidmore. In addition extensive proof was tendered to show that Skidmore employed Goldstein to acquire these properties and that Johnson's 50 per cent interests in the first group were obtained through Skidmore. This evidence was offered because (a) it demonstrated a strong motive on Goldstein's part to testify falsely concerning the acquisition and ownership of properties (b) it demonstrated complete knowledge on the part of Goldstein, at the trial, of the fact, crucial at the original trial, that Skidmore's ownership in the properties was highly important and the fact that concealment of that ownership was of grave importance to Skidmore and Goldstein,

and (c) it tended strongly to corroborate Johnson whose testimony contradicting Goldstein was the only conceivable testimony of an "eye witness" character that could be adduced on the question of falsity of Goldstein's testimony. The trial court, conceiving this evidence to be offered only to the issue (characterized by him as "of lively interest" at the main trial) of the extent of Johnson's ownership of the properties in question, important at the trial because it bore upon the amount of personal expenditures he made during the years involved, treated all such testimony as though offered to show only that on a second trial with this as additional evidence an acquittal rather than a conviction would result. The trial court held that evidence of Skidmore's acquisition and half ownership in the Bon Air and adjacent properties, the Dells and 9730 Western Avenue and his ownership of the escrows and the Albany Park Bank Building had no bearing on the question of whether Goldstein testified falsely. This holding resulted from a misconception of the purpose for which defendants offered the testimony. The trial court conceived defendants contention to be (a) Goldstein testified that Johnson was the "sole owner" of all of these properties (b) the motion evidence proved Skidmore to be the half-owner of some, and the sole owner of the remainder, and (c) therefore, Goldstein was shown to have testified falsely. Answering this supposed contention the trial court held that Goldstein did not state that Johnson was the "sole owner" of these properties and therefore proof that he was not the sole owner did not prove that Goldstein lied. (Defendants did, and do, contend that the purpose, effect and meaning of Goldstein's testimony was to place sole ownership of all of these properties in Johnson and that in evaluating the materiality and importance of Goldstein's testimony this fact was of the utmost significance.) Defendants also contend that evi-

dence proving Johnson was not the sole owner and that Skidmore, Goldstein's client had an ownership interest which was concealed by Goldstein at the trial to save Skidmore from criminal and civil liability with full knowledge by Goldstein of the fact of Skidmore's ownership is sufficient to raise serious question concerning the falsity of Goldstein's testimony that he had purchased the properties for Johnson with currency given him by Johnson.

However, the defendants did not rely solely on this important evidence but went further and introduced evidence of admissions by Goldstein that his exact testimony was false, evidence strongly corroborating Johnson's categorical denial of the Goldstein testimony and evidence of actions by Goldstein irreconcilable with the truth of his testimony. None of this evidence was considered by the trial court in the light of the purpose for which it was offered because of his determination that the primary purpose of defendants' evidence was to show something less than sole ownership in Johnson rather than to prove the falsity of Goldstein's testimony.

The court held that, "the ownership of these various properties was a subject of lively interest at the trial" (R. 466), that each side at the trial presented evidence as to ownership of the ten properties here involved (R. 466-467) and stated that on the motion for new trial the "ownership is now questioned" (R. 468). The court thus treated the motion not so much as raising the issue of falsity of the testimony of Goldstein but as a renewed contention that Johnson did not own the properties. The court refers (R. 474) to the trial testimony of defendants' expert witness Sullivan (3 MR. 991-996) tabulating Johnson's income and expenditure items in response to a hypothetical question that eliminated from the Government's computation

(made by its expert Clifford (3 MR. 741-745)) the items of property Johnson said he did not own. The court then states that by this testimony defendant "put before the jury the *very contention* that they are now seeking to present again in the present motion" (R. 474).¹¹

Thus viewing the issue as being the same as on the trial, the court rejected "each and every such item" as "excluded from the classification 'newly discovered evidence warranting a new trial' by at least one of the elements of the rule" of the *Berry* case, as being "merely cumulative" or "merely impeaching"¹² and on the ground that the defendants had not been diligent as to any of the items except, as to Green's impeaching affidavit (R. 514-515). Having thus excluded this evidence, the court reiterated that it did not believe Goldstein had "perjured himself" on the trial. It said that Johnson is the one person referred to in the evidence who habitually used currency in large amounts and habitually kept large amounts of money on hand (R. 515).¹³

¹¹ The court ignores the fact that Sullivan did not contradict Goldstein. He was merely an expert accountant who tabulated various items in answer to hypothetical questions and did not himself testify on the propriety of including or excluding any of such items from the computation based on whether Johnson did or did not make any of the expenditures charged by Goldstein.

¹² There was no consideration by the court as to whether any of these affidavits were admissible for consideration as establishing false swearing under the rule of the *Larrison* case which recognizes that evidence directed to false swearing may be considered even though cumulative as to issues on the trial.

The court ignored the fact that all these affidavits were directed to the new issue whether Goldstein testified falsely. It held that because they dealt with facts as to the source of income for purchase of property and Goldstein's delivery to Johnson of deeds to property, the affidavits were to be treated as though directed to the same issue as that at the trial—the ownership of property and escrows. Hence they were cumulative. Of course, evidence to show falsity will in its nature necessarily impeach. *Under the trial court's rule, there could be no evidence justifying new trial on the ground of false swearing.*

¹³ The court and the Government in making the same contention now (Br. 20, 93) ignored the affidavits of Garry (R. 107), Piazza (R. 167), Shaftron (R. 82), Herman (R. 115) and Jacobs (R. 162), showing that Skidmore customarily paid out large sums of money in cash. See also 123 F. 2d 604, 608, showing large daily receipts of cash by Skidmore.

Circuit Court of Appeals Opinion.

The circuit court of appeals did not reverse the trial court for failure to apply the *Larrison* case since, in view of the fact that the finding that the Goldstein testimony was not false was accepted by the appellate court, the result even under the *Larrison* case would have been a denial. *Larrison v. United States*, 24 F. 2d 82. The court stated that it could not say "in the light of the whole record before the district court that the so-called newly discovered evidence *inevitably* leads to the conclusion that Goldstein had testified falsely. We cannot say, as a matter of law, that the district court erred in its finding."

Facts on Which Amended Motion for New Trial Was Based.

The amended motion for new trial relied on all the evidence submitted in support of the original motion (R. 29) plus the amended and delinquent returns for income tax of Theodore Goldstein for 1937-1943, inclusive, filed and paid by William Goldstein, as his agent (R. 33, 47-74), and two additional affidavits of Sampson and Wait (R. 75, 76).

Trial Court Opinion on Amended Motion.

On the amended motion for new trial the trial court quoted and readopted its prior holding that the rule of law governing the court in its consideration of the motion was that of *Berry v. State*, 10 Ga. 511, applicable to ordinary motions for new trial on the ground of newly discovered evidence (AR. 136-137). The court quoted from its prior opinion to the effect that the issue presented on the motion was as to the ownership of the properties (AR. 140-141).

The trial court again failed to notice that the rule of the *Larrison* case controls consideration of motions for new

trial based on newly discovered evidence of false swearing. And it again failed to recognize the substantial probative effect on the issue of false swearing by Goldstein resulting from the evidence of ownership of Skidmore which in turn established motive of Goldstein and corroboration of Johnson who directly contradicted Goldstein. It recognized that the income tax returns might reasonably be held to be evidence that, during the years in question, Ted Goldstein had some interest in the property, other than as the holder of the pure legal title (AR. 152). However, it held the income tax returns must be excluded, under the rule in the *Berry* case because (1) not so material that they would probably produce a different verdict if a new trial were granted and (2) cumulative only.

It held "each and every" item of the evidence excluded from the classification "newly discovered evidence warranting a new trial" by reference to the *Berry* case (AR. 167-168). It then stated that the court does not believe that Goldstein recanted or prejudured himself (AR. 168). An order denying motion for a new trial was entered accordingly (AR. 171).

Circuit Court of Appeals Opinion on Amended Motion.

On appeal from the denial of the amended motion for new trial the court below held that the trial court erred in considering the evidence solely with respect to whether on a new trial it would probably result in an acquittal and failing to consider it as bearing upon the question whether the original trial was a fair trial (AR. 228). The appellate court examined the evidence from the standpoint of whether Goldstein had testified falsely at the original trial to the prejudice of the defendants and found that the evidence "unerringly points to the fact that Goldstein's trial testimony was false" (AR. 227). It stated that its "con-

viction in this respect is without reservation" (AR. 226). As to the Goldstein affidavits on which the Government relied, the court held (AR. 225): "The proof therein contained affords no substantial support for a finding that he testified truthfully at the trial." On the question of whether Goldstein's testimony was material or important the court said (AR. 209): "That Goldstein's testimony was material and, if false, was highly prejudicial to the defendants, is not in dispute." On the question of diligence the court held (AR. 230): "we are of the view that there has been no delay so unreasonable as to preclude consideration of the proof which defendants have presented." Thus finding that all of the elements of the *Larrison* case were satisfied, the court concluded that the trial court's failure to order a new trial constituted an abuse of discretion.¹⁴

The court entered its order directing new trial accordingly (AR. 237).

SUMMARY OF ARGUMENT.

1. Certiorari was granted in this case to review the question whether the court below "applied improper standards in reviewing and reversing the action of the district court". The Government now states the question to be "whether the trial court abused its discretion * * *", a manifestly different question in the light of the rule that determination by an intermediate court on review of a trial court decision involving exercise of judicial discretion will not be set aside except for strong reasons. *Meccano, Ltd. v. Wanamaker*, 253 U. S. 136, 141. Under numerous decisions of this Court questions not raised in the petition are

¹⁴ The court adverted to its prior opinion affirming the denial of defendants' original motion for new trial and observed that it had in that case accorded the rule "a more strict application than the circumstances justified", and furthermore the evidence on the amended motion furnished "strong additional support for the contention that Goldstein's testimony was false" (AR. 227).

not open for argument on writ of certiorari. Because the Government brief contains no specification of errors, no error of the court below is presented for review here. Furthermore, except for the first, the points in the Government brief are addressed to the action of the trial court and not to the judgment of the appellate court brought here for review. The decision below should therefore be affirmed.

2. The evidence in support of defendants' motion required a new trial under the rule of *Larrison v. United States*, 24 F.2d 82, establishing the criteria for consideration of motions for new trial based on newly discovered evidence of false testimony, and as well required new trial under the rule generally applicable to motions for new trial for newly discovered evidence directed to the issue of guilt or innocence at the trial. The three propositions required by the rule of the *Larrison* case (1) false testimony by a material witness, (2) that without the false testimony the jury *might* have reached a different result and (3) that the party seeking the new trial was taken by surprise and was unable to meet the false testimony at the trial or did not learn of its falsity until after the trial were established. Evidence of Goldstein's false swearing includes showing that he was motivated by a desire to protect his client Skidmore in furtherance of a conspiracy with him to conceal Skidmore's acquisition and ownership of properties and so avoid civil and criminal liability of the latter for income tax evasion. For perjury before the grand jury in furtherance of that conspiracy he had been indicted, and was under the recognized threat of prosecution on that indictment. Numerous overt acts by both Skidmore and Goldstein in furtherance of that conspiracy are shown. Shortly after he testified for the Government in this case, his bail was lifted with the consent of the Government and he has been free for five years upon his own recognizance. Gold-

stein also has a strong motive to continue to support his trial testimony in order to retain the aid of the United States attorney in avoiding disbarment on complaints filed with the State Bar Association. Goldstein also found reward in this very case in that the indictment in the instant case, which also included him, was dismissed as to him and his client on the morning of the first day of the trial. The evidence shows that Goldstein, after the trial made statements inconsistent with his trial testimony respecting the source of the purchase money for Bon Air, the largest single property whose ownership was charged to Johnson as a result of his testimony. Affidavits of an attorney and of an estate officer having no possible interest in the case show that after the trial Goldstein claimed as his own escrow deposits he had testified were made with money furnished him by Johnson. His actions and statements after trial were also inconsistent with his testimony that money for the making of other investments had been furnished him by Johnson. As to the Albany Park Bank Building, his trial testimony that the purchase price had been given him by Johnson, that Johnson had requested Goldstein to purchase the property for him and that his son Ted Goldstein had delivered a quitclaim deed to Johnson are shown to be false by Goldstein's actions after the trial and by income tax returns filed by Goldstein on behalf of his son Ted. Goldstein's affidavits on the original motion for new trial with respect to this property are also shown to be false or inconsistent with other affidavits made by him. Goldstein also made two general admissions that his testimony against Johnson had been false at the trial. Despite the fact that the original motion for new trial was first filed in October, 1943, the Government has been unable to adduce a single witness to corroborate Goldstein's trial testimony here in question. The record itself affords no

corroboration for Goldstein and all of the circumstances shown by the evidence indicate that Johnson told the truth in denying that he gave Goldstein the purchase moneys.

The question of guilt on the original trial was narrowly balanced and the circuit court of appeals held that the materiality and prejudicial nature of Goldstein's testimony was not in dispute. Contrary to the Government's position now, a reversal of its position when the case was before this court at the 1942 Term, the expenditure evidence furnished important support for, and was relied on to fortify, the ownership theory. Goldstein's challenged testimony was used for this purpose, and in addition his testimony as to Albany Park Bank Building was, without regard to expenditure involved, important to the ownership theory. Under the charge to the jury instructing that if part of a witness's testimony was disbelieved, it might be disregarded in toto, the testimony of Goldstein was plainly prejudicial since it was in extended and direct conflict with the testimony of Johnson which, if believed, would require acquittal. The Government does not seriously argue the question of diligence. The Government's argument that the appellate court applied the wrong rule of law in invoking the *Larrison* case is posited on the proposition that the evidence of falsity was not sufficiently clear and convincing. It amounts to no more than another form of argument that the evidence of false swearing was insufficient.

Even under the rule of *Berry v. State*, 10 Ga. 511 urged as the applicable rule by the Government, the respondents were entitled to a new trial because the evidence submitted on the motion was so material that it would probably produce a different verdict if a new trial were granted. The evidence demonstrates that Johnson in fact never made any expenditures not reconcilable with his reported income and the Government, by bills of particulars filed under pending indictments against Johnson's co-defend-

ants has abandoned the charge that Johnson was the owner of the gambling houses upon which it relied in support of the so-called ownership theory. Johnson's testimony at the trial as to his personal expenditures is proved to be true by the motion evidence which thus furnishes important corroboration and support for all of his testimony, which if believed would required acquittal.

3. The trial court's denial of the amended motion for a new trial constituted an abuse of discretion, traceable largely to its basic misconception that the evidence of ownership of investment properties by Skidmore was aimed directly at showing Goldstein's exact words were false. The court erroneously held that respondents pitched their case on the wrong assumption that Goldstein had testified in so many words that Johnson was the owner of the properties on which the Government relied as showing excessive expenditures. It also erroneously held the proof of Goldstein's false swearing should be by formal recantation or by affidavits of persons having personal knowledge of a transaction of which, by Goldstein's testimony only he and Johnson could know. Because the motion evidence tended also to show the innocence of Johnson and the co-defendant of the charge on which they were tried, the trial court erroneously held that it could not support an order for new trial because cumulative. The court thus erred in overlooking that evidence pertinent on the issue of false swearing could not be rejected on the ground that it might be cumulative on the different trial issue—Was Johnson the sole owner of the properties?

The trial court, in considering the sufficiency of the evidence to require order for new trial under the doctrine of *Berry v. State*, *supra*, committed obvious error in holding that evidence, because it was cumulative or impeaching must be rejected. The court confused the rule that evi-

dence which is "merely cumulative" or "merely impeaching" and hence not such as would probably produce an acquittal on a new trial is insufficient, and overlooked the fact that evidence that is cumulative, as it necessarily must be in most cases, or impeaching, may well be so convincing as to leave no doubt that an acquittal would result and hence require a new trial. The trial court also overlooked and gave no effect to the fact that all of the evidence on the motion for new trial and on the amended motion had been initially considered by the circuit court of appeals and that the granting of the order of remand constituted a holding by that court that the evidence was not insufficient to justify a new trial.

4. Mere perusal of the opinion of the circuit court of appeals shows that it did not apply improper standards in reviewing and reversing the action of the district court and that its conclusion that the trial court had abused its discretion was based on numerous errors of law and arbitrary actions of the trial court in the consideration of the evidence. The scope of its review was in this case not limited by the added respect afforded to findings of a trial judge who has had opportunity to observe the demeanor of witnesses because all of the evidence was documentary or in the form of affidavits.

The record affirmatively shows that the circuit court of appeals was required on the evidence to conclude that the evidence pointed irresistibly to false swearing by Goldstein at the trial and that Goldstein's affidavits were not worthy of belief. In so determining, and in holding that the contrary conclusion of the trial court constituted an abuse of discretion the circuit court of appeals committed no error and the United States has failed to establish any.

ARGUMENT.

I.

THE ONLY QUESTION PRESENTED AND PROPERLY BEFORE THIS COURT IS WHETHER THE CIRCUIT COURT OF APPEALS APPLIED IMPROPER STANDARDS IN REVIEWING AND RE- VERSING THE ACTION OF THE DISTRICT COURT.

Examination of the Index and Points of Argument of the Government's brief indicates that the case here on certiorari is regarded by the Government primarily as a vehicle for review of the correctness of the trial court's decision. The Government's brief contains no specification of errors whatsoever and only a relatively small portion of the argument (the first Point) even purports to be addressed to the action of the court whose judgment is here for review.

Questions not raised on the petition will not be considered.—The petition for certiorari on which the writ was granted states as the "Question Presented" (Pet. 3):

"Whether the court below applied improper standards in reviewing and reversing the action of the district court denying respondents' second, amended motion for a new trial based on allegedly newly discovered evidence that a Government witness testified falsely at respondents' trial."

The Government has shifted its position. It now appears that all that is sought is a reconsideration and review by this Court of all the evidence before the trial court. For the Government now states (Br. 2) as the "Question Presented":

"Whether the trial court abused its discretion in denying respondents' amended motion for a new trial purportedly based on allegedly newly discovered evi-

dence that a Government witness testified falsely at respondents' trial."

The Government thus fully confirms the statement in our Brief in Opposition to the Petition, p. 14:

"the Government is here merely seeking another review of the facts, in a record now constituting many thousand pages."

The petition for certiorari contained no specification of errors intended to be urged. We assume that this Court does not intend in this case to depart from the well-established and recently re-enunciated rule that questions not urged in the petition are not open for argument on certiorari. *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240; *Steele v. Drummond*, 275 U. S. 199, 203; *Helvering v. Taylor*, 293 U. S. 507, 511; *Prudence Co. v. Fidelity & Deposit Co. of Md.*, 297 U. S. 198, 208; *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479, 494; *Connecticut Ry. Co. v. Palmer*, 305 U. S. 493, 497; *Rorick v. Devon Syndicate*, 307 U. S. 299; *Dickinson v. Cowan*, 309 U. S. 382, 389.

The Government brief on the merits specifies no error for consideration by this Court.—Rule 27, par. 2, prescribes that the brief shall contain "(e) A specification of such of the assigned errors as are intended to be urged." The Government brief contains none. The same Rule 27, par. 6, provides "errors not specified according to this rule will be disregarded, save as the court at its option, may notice a plain error not assigned or specified."

The record contains no plain error. The judgment of the court should therefore be affirmed.

From the index stating the points of the Government's argument, it appears that the only part of the argument addressed to the action of the circuit court of appeals (it is the judgment of that court that is here for review), and the only part of the argument that falls within the

scope of the question urged in the petition for certiorari is the first point (Gov't Br. 67):

"The majority opinion below improperly rejects the trial court's conclusions and substitutes the majority's own conclusions as to the weight of the motion evidence instead of determining whether the trial court's factual conclusions are unreasonable, arbitrary or capricious."

The remaining stated points of argument in the Government's brief are addressed to the action of the trial court as though the case were here on appeal from the district court, and the United States were respondent. We show below that there is no merit in any point urged by the government.

II.

THE EVIDENCE IN SUPPORT OF DEFENDANTS' MOTION REQUIRED THE ALLOWANCE OF A NEW TRIAL.

It is the defendants' contention that whether the evidence be viewed as addressed to the issue of false swearing by Goldstein at the trial already had or as addressed to the issue whether the newly discovered evidence if adduced at a new trial would probably result in acquittal, it is in either event sufficient to require granting of the motion.

A. THE MOTION EVIDENCE CLEARLY DEMONSTRATED THE RIGHT OF DEFENDANTS TO A NEW TRIAL BECAUSE OF FALSE TESTIMONY AT THE TRIAL HAD.

The motion evidence clearly demonstrates that the testimony of Goldstein, a material witness at the trial, was false, that without such testimony the jury might have reached a different result and that there has been no lack of diligence on the part of defendants.

Goldstein's testimony as to each of the seven properties: Bon Air and its four adjacent properties, 9730 Western

Avenue, and The Dells, was that he received the purchase money from Johnson, acted in purchasing the property at the request of Johnson and delivered a quit claim deed to the property to Johnson (2 MR. 56, 57-59). The respondents' evidence shows that Goldstein did not obtain the money from Johnson. Their evidence also shows that as to 9730 Western Avenue and the "Dells", Johnson was given a quit claim deed for only a one-half interest. The evidence also shows that quit claim deeds for 100% interest in the Bon Air and adjacent properties were only given by Goldstein to Johnson so that he could record them in order to conceal Skidmore's half interest in the properties.

Goldstein's testimony as to the two escrows of \$10,000 and \$7,500 was that Johnson furnished the money. (2 MR. 61). Respondents' evidence shows that Johnson did not give Goldstein the money, that Goldstein repudiated this testimony and that the money was probably Skidmore's.

As to the Albany Park Bank Building, Goldstein testified (2 MR. 57): "I was requested by Mr. Johnson to go out there and purchase the building for him. * * * I received the money from Mr. Johnson, in the form of currency. * * * Subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son." Respondents' evidence shows that Johnson did not give Goldstein the money to purchase this property, it was not purchased for Johnson, and that no quit claim deed was delivered to Johnson.

1. Goldstein Testified Falsely at the Trial.—Goldstein's testimony concerning the payment of money to him by Johnson for the purchase of the various properties in question made the occasions of such payments private meetings at unspecified times and places (2 MR. 118-124, 126-127). That they took place at all was categorically denied

by Johnson. Under Goldstein's version only himself and Johnson could possibly have been eye witnesses to the meetings. Under Johnson's version there could have been no eye witnesses since the meetings never took place. Proof that Goldstein testified falsely concerning these meetings and the payment of the money therefore could only be made by showing:

- (a) That he had strong motive for testifying falsely.
- (b) That he admitted the falsity of his testimony either by formal affidavit of recantation or in statements to other persons.
- (c) His lack of reliability as a credible witness.
- (d) Statements and actions of Goldstein inconsistent with the possibility of the truth of his testimony.
- (e) Corroboration of Johnson's contradicting testimony.
- (f) Absence of motive on Johnson's part to testify falsely on this point.
- (g) Johnson's reliability as a witness.

All of the evidence offered by defendants falls within one or more of these categories and taken together conclusively demonstrates that Goldstein testified falsely.

Goldstein had impelling motives to testify falsely.—Goldstein is a Chicago lawyer who, prior to the time of this trial had been attorney for William R. Skidmore for twenty years (2 MR. 65). Skidmore was a "seller" of protection to those who engaged in the "handbook" business in Chicago and who received payments therefor in large sums of cash (*United States v. Skidmore*, 123 F. 2d 604, 608, cert. den. 315 U. S. 800, No. 813, O. T. 1941). At the time of Goldstein's testimony in this case Skidmore was under two indictments for attempts to defeat and evade a portion of

his income taxes. Income for the years 1933 to 1937, inclusive, were covered by the first, returned September 1, 1939, and his income for the year 1938 was covered by the second indictment, returned February 29, 1940 (123 F. 2d 604, 606). The Government's case against Skidmore was based on the "net worth" theory, i. e., that Skidmore "bought large amounts of valuable real estate and made extensive improvements upon them," "that his expenditures for those years were greatly in excess of his reported cash receipts, including borrowed money." Calculations of revenue agents at Skidmore's trial "for the years 1936, 1937 and 1938 [being three of the four years involved in the instant case] showed an excess of expenditures over his reported income in the respective amounts of \$33,095.49, \$117,580.44 & \$94,097.67" (123 F. 2d 604, 608). It is admitted that at the time of his testimony in the case against Johnson, Goldstein was attorney of record for Skidmore in the then pending criminal tax evasion cases against him and in the companion civil tax case. The criminal case against Skidmore was not tried until some four months after the Johnson trial (123 F. 2d 604, 607).

It was thus of crucial importance for Skidmore to conceal any expenditures he made during the years 1936, 1937, and 1938 which would tend to show that he had any unreported taxable income in those years. The evidence shows beyond any dispute—indeed, it is not contradicted—that Skidmore during these three years acquired an ownership interest in the properties involved, that he himself participated in Goldstein's negotiations with some of the owners of them prior to Goldstein's purchase of such properties, that he sent selling agents for the owners of some of the properties to Goldstein to negotiate for the purchase, that he had an architect appraise several of them prior to Goldstein's purchase, and that he himself inspected

some of the properties prior to their purchase by Goldstein.¹⁵

That Goldstein and Skidmore conspired to conceal Skidmore's acquisition of these properties and his ownership in them is amply established.

Numerous overt acts by both Skidmore and Goldstein in furtherance of this conspiracy are shown. For example, the recording of title to the Bon Air and adjacent properties in Johnson's name by Goldstein to conceal (R. 163) and his use of the device of quit claim deeds from Johnson to Skidmore for a half interest in the properties to protect Skidmore's ownership (R. 163, 188); the destruction by Jacobs at Skidmore's instance (R. 163) of insurance company records which showed that Skidmore had ordered and paid for premiums on policies covering the Bon Air (R. 162); the assignment (without Johnson's knowledge) to Johnson of numerous small policies covering some of the Bon Air properties at the time title to such properties was recorded in his name; the admonition by Skidmore in Goldstein's presence to Shaffron to deny Skidmore's admitted ownership in the Bon Air because the Government was trying "to pin" it on him (R. 83); the directions to Henrichsen and Alice Kemp to conceal and deny Skidmore's ownership in the properties (R. 84); Goldstein's false testimony at the trial of these cases designed to conceal Skidmore's interest in the properties by making it appear that Johnson was the sole owner of them;¹⁶ Skidmore's denial of his ownership in his own criminal trial; Goldstein's representations to Holleran and Guild and to the State

¹⁵ We have detailed in the Appendix to this Brief the voluminous evidence on this point adduced on the original motion for new trial and made a part of the evidence on the amended motion.

¹⁶ Goldstein's forced admission on cross examination that Johnson had only a half interest and that Skidmore had the other half interest in 9730 Western Avenue, wrung from him by production of a deed he himself had drawn and delivered to Johnson (2 MR. 56, 63-65) and his attempt to explain his direct testimony designed to place sole ownership in Johnson by the statement that he had forgotten and that "Had I remembered, I would have said so" (2 MR. 67) reveal alike Skidmore's ownership and Goldstein's purpose to conceal it.

Bank of Evanston that he was the owner of the escrows (R. 128, 132-134) and his representations to Blockus that he was the owner of the Albany Park Bank Building (R. 198); Goldstein's patently false affidavits that he was holding the \$7500 escrow for the Bureau of Internal Revenue and the rents of the Albany Park Bank Building for the same purpose because of a lien for Johnson's taxes (R. 252, 261); Goldstein's attempts to use such rents to settle real estate tax claims against the Albany Park Bank Building (R. 198-199); Skidmore's decision at Goldstein's instance not to defend a partition suit which would have required disclosure of his interest in Bon Air property (R. 101); Goldstein's offer to use some of the \$10,000 escrow to settle a lawsuit in which he and Skidmore were defendants if the escrow was released (R. 133-134); Skidmore's direction to Henrichsen to return mail addressed to him at the Bon Air with a notation that he was not known at that address (R. 84) and his direction to Henrichsen to keep Goldstein advised as to any litigation affecting title to the property, etc. (R. 90). It cannot be questioned therefore that Goldstein and Skidmore desired strongly to conceal Skidmore's ownership in these properties and that Goldstein was not only willing to testify falsely under oath to further that purpose, but as the Government admits, had done so on at least one other occasion.

In addition, Goldstein told Green that he had to testify falsely at the trial of these cases to help himself because of "charges of contempt, conspiracy, and perjury pending against him and to help Skidmore" (R. 100). Goldstein also told Green "I might as well be dead as disbarred" (R. 216). So completely corroborated are these admissions of Goldstein to Green that Goldstein sought escape by denying that he had made admissions in his admitted conversations with Green prior to the filing of Green's affidavit (R. 243) but felt called upon to deny that he had ever had the conversation sworn to by Green in which he upbraided Green

for telling the truth in such affidavits (R. 264). Proof by the completely disinterested witness Engelbretson that Goldstein did seek Green out at the time and place sworn to by Green proves Goldstein's denials false, and completely corroborates Green (R. 232).

But Goldstein was subject to another compelling motive: To obtain immunity from prosecution on the indictment for perjury returned against him for testifying falsely before the grand jury in an attempt to protect Skidmore from indictment for income tax evasion. The pendency of an indictment over a witness for the prosecution of course is relevant to show the witness' interest in testifying favorably for the prosecution, and indicates the "possibility of his currying favor by testifying for the state." 3 Wigmore on Evidence, 3d ed., secs. 949, 967. The Government has never denied the statement in our brief in the circuit court of appeals on appeal from the order denying the first motion for new trial:

"Goldstein was arraigned on this indictment and released on bail shortly thereafter, in February 1940. At the time he gave testimony for the Government in these cases he was at large on that bail. Shortly after he testified his bail was lifted with the consent of the Government and he was released upon his own recognizance. He has not yet been brought to trial on this indictment."

This has never been denied or explained.

Goldstein also has a strong motive to continue to support his trial testimony by false affidavits on the motion for new trial in order to avert prosecution on the perjury indictment and as well to retain the aid of the United States Attorney to avoid disbarment by the State Bar Association. A complaint against Goldstein charging perjury was filed with the Illinois Bar Association in 1942

(R. 240) but investigation was twice deferred at the request of Mr. Woll (R. 64; AR. 210). That complaint is still pending. Although Goldstein denied so stating (R. 243), there is thus ample factual support for Green's affidavit that Goldstein after the trial explained that he had to thus falsely testify "to help himself because of charges of contempt, conspiracy and perjury pending against him and to help Skidmore," and that he did so because "Mr. Skidmore always paid him; that Mr. William R. Johnson never paid him anything" and he could not retract because then "he would certainly be disbarred" (R. 100).

Of course, Goldstein by testifying against Johnson also found reward in thus securing the dismissal of the instant indictments against Skidmore and himself on the very morning of the trial (1 MR. 143). The Government attempts to minimize the importance to Skidmore of concealing his ownership in these properties by pointing out that Skidmore was convicted anyway (Gov't. Br. 92). This is in contrast to the Government's attempt in Skidmore's criminal case to force an admission from him that he had an ownership interest in the Bon Air (R. 316). It also disregards the fact that Goldstein could appreciably reduce Skidmore's civil tax liability through concealment of his property interests.

It cannot be questioned that Goldstein and Skidmore desired strongly to conceal Skidmore's expenditures. Goldstein was not only under strong pressures to testify falsely to that end, but the Government admits he has already done so and has indicted him for it.

Goldstein made statements inconsistent with his trial testimony respecting source of purchase money for Bon Air.—The affidavit of Fowler shows that Goldstein swore falsely. Goldstein testified that in the purchase of Bon Air

Country Club he acted at the request of Johnson. The Evanston Bank was the receiver of the property. The price was \$75,000 (2 MR. 57). Goldstein further testified (2 MR. 57):

"I think the initial deposit of \$7500.00 was deposited with Mr. Becker at the Evanston Bank and Mr. Blumstein, the attorney. I received the money from Mr. Johnson in the form of currency. * * * The balance of \$67,500 was paid over to Mr. Becker and Mr. Blumstein at their law offices, in the form of currency that I received from Mr. Johnson."¹⁷

The affidavit of Fowler shows contrary statements by Goldstein. Fowler, a resident of Waukegan, from the date of its first publication, September 5, 1939, until January, 1941, when he resigned and retired, was the Treasurer and Executive Director of The Waukegan Post, Inc. (R. 213) of which William Goldstein was president and publisher (2 MR. 62-63). The Fowler affidavit states (R. 213) that on a number of occasions:

"Mr. William Goldstein told me that he had bought the property known as the Bon Air Country Club for his client, Mr. William Skidmore, whom I had known for many years. That Mr. Skidmore had given him (Goldstein) the money to buy the said Bon Air Country Club property."

This statement squarely contradicts Goldstein's trial testimony that the purchase price for Bon Air was "in the form of currency * * * received from Mr. Johnson" (2 MR. 57). The Government here retreats from its assertion that defendants misapprehend Goldstein's testimony (Br. 67-69).

The Government admits (Br. 41-42): "If true, this alleged statement by Goldstein is directly in conflict with his testimony that Johnson gave him the money to purchase

¹⁷ The testimony of Goldstein is set out verbatim in view of the Government's assertion that respondents misconceive Goldstein's testimony and have not argued the falsity of his actual testimony (Br. 65, 84, 107).

Bon Air." This admission justifies careful scrutiny of the alleged basis for disregarding the Fowler affidavit.

Goldstein denies he made the statement and states that Fowler has been unfriendly since he discharged him (R. 264). In support, an affidavit of attorney Lidschin reveals that he brought suit for the newspaper company to restrain Fowler from cashing an unauthorized check (R. 267). The trial court apparently recognized that this was inadequate ground for ignoring the Fowler affidavit and held him discredited because of affidavits directed to another statement in the Fowler affidavit (R. 479, 497). The Government also relies on the same ground (Br. 42, 97).

Careful examination of the evidence shows that it all confirms Fowler and emphasizes the desperate lengths to which Goldstein and the Government were forced in view of the devastating effect of the Fowler affidavit which the Government explicitly recognizes. Fowler in the same affidavit also stated (R. 214) that after September, 1940 on an occasion when he asked Goldstein to collect from Johnson an account owed by Bon Air Country Club, Goldstein replied: "I won't see Johnson, he don't own the place. I'll tell the Boss (Skidmore) about it." He gave Goldstein the duplicate bills and statement. The bill was paid within a few days (R. 214).

Goldstein, in denying this, asserts (R. 264) that he instructed Fowler to turn the account over to an attorney, Joe Miller, who later started suit and collected the account. In purported confirmation of Goldstein's denial the Government relied on the affidavit of Lidschin (R. 266)¹⁸ that on or about October 4, 1941, Miller handed him a letter of that date dictated by an Ernest L. Pratt and asking that suit be brought on behalf of the Waukegan Post, Inc., that

¹⁸ Reference to the original record will show that in the Lidschin affidavit (R. 266) there is a printing omission. After the word "Illinois" in the second line, there should be inserted, "On or about October 4, 1941, Mr. J. A. Miller, an attorney at law in Waukegan, Illinois."

upon trial, defense was non-delivery of merchandise, judgment for \$57.60 was entered, the Waukegan Post promised to deliver and the judgment was paid. Judge Barnes held this affidavit showed Fowler untrue (R. 479, 480).

The trial court overlooked the fact that Fowler had left the Waukegan Post in January, 1941 and therefore could not have directed the suit requested by letter of October 4, 1941 (R. 265, 213). Nevertheless, the court held that Lidschin's affidavit established the untruth of Fowler's affidavit (R. 479).

Although it seemed plain that Lidschin's affidavit referred to an entirely different bill, on the amended motion for new trial defendants submitted the affidavit of Wait (R. 75) which removes all doubt. Wait was manager of Bon Air (3.MR. 896, 897). His affidavit conclusively shows that Lidschin was referring to suit on a bill based on an order first placed on April 16, 1941, four months after Fowler ceased employment with the Waukegan Post. Attached to the affidavit is a copy of the invoice for \$57.60 dated July 8, 1941, showing that the order was given "4-16."¹⁹

The Wait affidavit does not contradict Lidschin, but shows that the Lidschin affidavit refers to a bill other than that to which Fowler referred. The Wait affidavit does destroy Goldstein's denial and explanation. The trial court, faced with this new affidavit, on the amended motion, referred to the fact that Wait was a gambler,²⁰ and said (AR. 167), "The Court does not think it has that effect."

¹⁹ It is pertinent to note that respondents obtained certificates from the clerks of both the county court and the circuit court of Lake County that from January 1, 1936 to September 17, 1943 no suit or action was instituted in those courts by the Waukegan Post or Joseph A. Miller against the Bon Air Country Club or the Bon Air Catering Company, Incorporated (R. 242).

²⁰ Wait, a defendant in this case, was acquitted (1 MR. 153) and had no reason to incur a perjury penalty.

The Government now in the face of Wait's clear affidavit contra, weakly urges (Br. 42, note), "it would appear * * * that the date '4-16' referred to the year 1940." The Government suggests suit was too early for an April 1941 order, overlooking that here the merchandise had not been delivered because of dispute as to price (R. 267, AR. 75) and overlooking also that Fowler refers to a bill for *advertising* and printing (R. 214), whereas the bill to which Goldstein, Lidschin and Wait refer was for letterheads and envelopes (AR. 75, R. 267).

The circuit court of appeals held (AR. 223): "There is nothing in the record, however, which impugns Fowler's reputation in any manner. He is not shown to have any connection with any of the parties or any motive for making a false affidavit."

The Government (Br. 37, 77), to support Goldstein argues that the affidavit of Sperling (R. 104) states that in June 1939 Skidmore gave Garry, the Bon Air Cashier, \$50,000 "to be applied against his share of the cost of the property and the cost and maintenance of the Club," and that on several other occasions Skidmore delivered amounts of \$10,000 and \$20,000 to Garry to apply on his account of cost and maintenance. The Government assumes that "cost of the property" means purchase price and argues that if Skidmore was paying the purchase price in 1939, he could not have given Goldstein the money in 1937, when the purchase was made. The Government assumes without warrant that the affiant used "cost" as synonymous with purchase price. "Cost" is used twice in the same sentence. In the second use, it obviously does not refer to purchase price and there is no more basis for assuming it means original purchase price in one instance than in the other. Aside from the fact that the affidavit of Garry, upon which the Government

relies (Gov't Br. 44, note) shows that the \$50,000 was for the payment of bills, it is highly improbable that Skidmore would make payment to Johnson by handing the money to a cashier and paymaster at the club.

As to the \$10,000 escrow, the affidavits of Holleran and Guild show statements of Goldstein inconsistent with his trial testimony.—At the trial Goldstein testified (2 MR. 61):

"\$10,000 was involved, covering some lots and acreage. The money was deposited with the Chicago Title & Trust Co., in the form of currency. I received it from Mr. Johnson, at whose request the deposit was made, on July 17, 1939."

Johnson testified that he did not furnish Mr. Goldstein the \$10,000 for deposit and that he knew nothing about the contract of purchase nor to what land it referred (3 MR. 957).

On the motion for new trial defendants introduced the affidavit of J. Lawrence Holleran, a practicing attorney, representing the beneficiary of the trust estate owning the property proposed to be sold and for which the \$10,000 was deposited (R. 128); the affidavit of John W. Guild, the manager of the same real estate trust (R. 138); the affidavit of Fowler (R. 124),²¹ and the affidavit of Henrichsen (R. 95).

The affidavit of Holleran (R. 130) shows that on November 1, 1940 (very shortly after the trial of this case—

²¹ Fowler's affidavit states that in the fall of 1940 he discussed with Goldstein the need of money for the Waukegan Post, Inc. Goldstein told him that he had \$10,000 in escrow in the Chicago Title & Trust Co. which would be available. (Skidmore was the owner of the Washington Post) (R. 214).

Walter Buck Henrichsen swore that Skidmore told him that he (Skidmore) "had \$10,000 in an escrow in the Chicago Title and Trust Company as earnest money on the purchase of property known as Columbia Gardens adjacent to the Bon Air; that Mr. Johnson had no interest in the said \$10,000.00 and that he (Mr. Skidmore) had attempted through William Goldstein to have the said \$10,000.00 withdrawn from the said escrow" (R. 95).

August 27 to October 12, 1940 (1 MR. 152, 2 MR. 1)) Goldstein wrote to Holleran disclosing Goldstein's demand on the Chicago Title and Trust Co. for the return of the \$10,000 escrow deposit to Goldstein; that shortly thereafter a meeting was arranged in Holleran's office between the latter, William Goldstein, Isadore Goldstein, an associate of William Goldstein,²² and Mr. Guild (R. 131-132); that at that time Goldstein stated to Mr. Holleran "that he was representing himself" (R. 133), and when Mr. Holleran referred to the fact that the escrow had been deposited in consideration, among other things, for the dismissal by Holleran of a suit for damages against the Bon Air Country Club, Goldstein said he had no interest in the Club and "that that was his money and had nothing to do with the Club" (R. 133). Goldstein said, "It was my money that I put up and I want it back" (R. 133). He offered to pay \$100 for release of the deposit (R. 133-134). On a subsequent date Goldstein, asked by Holleran whether the United States had any objection to withdrawal of the escrow answered "No, the Government had nothing to do with it; that it was his money and it was not in any wise involved in the Government case." Again, on another occasion he insisted to Mr. Holleran, "All I am interested in is my money. It is my money I put up and you can't deliver under the contract and I want my money back" (R. 135-136).

The deposition of John W. Guild, the real estate trust manager (R. 138) who was also present at the conference in the office of Mr. Holleran early in the month of November, 1940, also states unequivocally (R. 141): "Mr. Goldstein said that he wanted the return of his money that was on deposit in escrow." Goldstein made no statement that he was representing any individual other than him-

²² This associate was not called upon by the Government to furnish an affidavit denying any of the facts sworn to by Holleran.

self and said "he was the owner of the money" (R. 141). Mr. Guild also received from Goldstein a written demand for return of the money (R. 141). And the same question-and-answer affidavit of Mr. Guild affirms that Goldstein did at the conference in Holleran's office "at that time state that the money was his and that he wanted it returned * * *"

Goldstein does not deny that he made these statements. He merely says (R. 252), "I do not recall at any time stating that it was my money".

There is thus a square conflict between Goldstein's trial testimony that "I received it [the \$10,000 currency] from Johnson" (2 MR. 61) and his reiterated statements that it was his money. Defendants do not misapprehend what Goldstein's testimony was (Cf. Gov't Br. 67-68). The Government leaves the fact of direct conflict with Holleran and Guild unanswered (Br. 54-56). The arbitrary attitude of the trial court is well-exemplified in its purportedly "exhaustive review of all of respondents' motion evidence" (Cf. Gov't Br. 61). That court in what purports to be a resume of the affidavits of Holleran and Guild fails even to allude to these unequivocal sworn statements that Goldstein told them that the escrow deposit was "my money" (R. 490-491, 499, 501).

Moreover, although Goldstein claimed he held all of Johnson's money under an Internal Revenue lien, notice of which he claimed was served early in 1940 (AR. 252, 260-261), he offered to pay \$100 to release this deposit (R. 133). Such a lien runs against "all property and rights to property; whether real or personal, belonging to such person" (26 U. S. C. sec. 3670). The question arises: Are we asked to believe that Goldstein was volunteering \$100 of his own money to regain money for the Government?

The actions of Goldstein and his statement to Fowler were inconsistent with his testimony as to the \$7,500 escrow.—Goldstein testified at the trial (2 MR. 61):

"The amount of money involved was \$7,500, deposited at the State Bank of Evanston, in the form of currency, by myself, which I received from Mr. Johnson."

Shortly after the trial and on October 30, 1940, Goldstein withdrew this money from escrow, giving his receipt (R. 185). Goldstein told Fowler that the \$7,500 escrow deposit belonged to him and later told Fowler that he had withdrawn it (R. 214).

There is no mistaking Goldstein's testimony. He said that the money involved was "\$7,500 * * * in the form of currency * * * which I received from Mr. Johnson" and in his conversation with Fowler he stated he "had \$7500 in escrow in a Bank in Evanston" (R. 214). He actually withdrew the \$7500. Admittedly after four years he had still given no notice to Johnson that he had withdrawn this money (R. 235, 253).

The trial court said with respect to the \$7,500 escrow deposit, "The taking of the money down shows no more than the putting of it up and adds nothing that is not merely cumulative" (R. 513). The court thus utterly disregards our pertinent evidence on the point.

The opinion of the circuit court of appeals after careful consideration of the affidavits with respect to each of these escrows concludes, "These facts and circumstances persuasively point to the falsity of Goldstein's trial testimony that these deposits were the property of Johnson" (AR. 221-222).

The actions and statements of Goldstein were inconsistent with his testimony as to the "Dells".—At the trial Goldstein testified that the "Dells" property tract, constituting

eight acres, was bought for \$10,000 and that four adjacent acres were acquired for \$9,000. He said (2 MR. 59):

"I received that \$10,000 from Mr. Johnson in the form of currency and purchased that property at his request.

* * * * *

\$9,000 was involved in that transaction. I purchased the property at the request of Mr. Johnson, from whom I received the money deposited with the Chicago Title and Trust Co., in the form of currency."²³

The affidavits presented on the motion for new trial show that Skidmore handled the purchase of this property personally with Goldstein and one Sam Hare who told Skidmore the property could be purchased cheaply (R. 117). They dealt through Eli Herman, attorney for the property owner (R. 117, 231). The owner, one Fred Huscher, was told by Goldstein that Skidmore was one of the prospective purchasers (R. 178). Goldstein denies he mentioned the name of the purchaser (R. 260). Skidmore himself inspected the property and talked with Huscher, promising to let Huscher have all of the old iron and personal property on the premises (R. 178). Skidmore agreed to buy at a Sunday conference with Goldstein, Herman, and Hare, and at that time offered \$10,000 in cash to Goldstein for deposit in escrow (R. 231). After the deal was closed, Skidmore removed iron, concrete lamp posts, and tables and chairs from the property (R. 175, 177, 178). Skidmore paid Goldstein \$750 (2 MR. 67) and Hare \$500 for services (R. 118), and Herman, through Goldstein, \$300 attorney's

²³ The Government now contends that no one on the jury could have believed from Goldstein's testimony that Johnson was the sole owner of the Dells and of 9730 Western Avenue (Gov't Br. 129). Yet, the Government admits (Gov't Br. p. 24) that it has charged him with being the sole owner of the properties and renews that contention again in this Court solely on the basis of Goldstein's testimony (Gov't Br., App'x B).

fees (R. 232). A memorandum receipt in Skidmore's handwriting listing the costs of acquisition of the property including payment for services to Goldstein, Hare, and Herman in the amounts each admittedly received (Def'ts' Ex. J-3, R. 157, 2 MR. 66) refers to all of the costs of acquisition as "paid out" and shows receipt of \$10,000 and \$1,057.95 presumably from Johnson who testified he had agreed to purchase a one-half interest with Skidmore (3 MR. 955).²⁴

Statements, affidavits and tax returns filed by Goldstein with respect to the Albany Park Bank Building are inconsistent with his trial testimony and also inconsistent with each other.—Goldstein at the trial testified (1 MR. 56-57):

"I did have something to do with the purchase of the property known as the Albany Park Bank Building at 3424 Lawrence Avenue. * * * I was requested by Mr. Johnson to go out there and purchase the building for him. * * * I received the money from Mr. Johnson in the form of currency. * * * I purchased that property at the request of Mr. Johnson. The exact amount of money expended for the purchase of that property I think was around \$59,800. * * * I got that from Mr. Johnson in the form of currency. Title to that property was taken in the name of Ted W. Goldstein, my son. Subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son. This Albany Park Bank Building property was purchased July 16, 1937." (Emphasis supplied.)

The trial court accurately paraphrased this testimony as follows (R. 512):

²⁴ After Goldstein had identified this memorandum receipt to Johnson in Skidmore's handwriting which itemizes the various costs of acquisition of the "Dells," and after Goldstein had admitted Johnson received only a half interest in the 9730 Western Avenue property, defendants moved to reserve cross-examination of Goldstein on the other properties since they were taken by surprise. This motion was denied. On objection of the United States Attorney and when counsel sought instruction to the witness to remain in the jurisdiction, the court reaffirmed that no further cross-examination would be permitted (2 MR. 67, 68).

"Goldstein testified on the trial that he purchased this property for Johnson and paid for it with currency given him by Johnson; that he took title in the name of his son Ted Goldstein, and subsequently caused a quit-claim deed to be delivered to Johnson."

Important and not to be overlooked is the statement of Goldstein that a quit claim deed was delivered to Johnson.²⁵ Johnson testified (2 MR. 955):

"I do not own the Albany Park Bank Building or any part of it, and I did not employ Goldstein to buy the property for me and never gave him any money to make the purchase and no deed was ever delivered to me."²⁶

The statement that a quit claim deed was delivered to Johnson was obviously to support the testimony that the money was received from Johnson. Delivery of the money by Johnson to Goldstein was impossible to disprove directly other than by contradiction by Johnson. To show the

²⁵ The Government complains that defendants have erroneously conceived Goldstein's testimony to have been that Johnson was "the sole owner" of the several properties (Gov't Br. 84-85).

In the light of the testimony of Goldstein we believe he did in effect testify that Johnson became the owner of the Albany Park Bank Building. Certainly his testimony states all of the elements that are deemed necessary to support a conclusion of ownership by a jury or by a witness (if such conclusion by a witness is permissible).

The circuit court of appeals said (AR. 211): "In our opinion, the government makes an ill-advised attempt to escape defendants' contention that Goldstein testified that Johnson was the owner of the properties in question but embraced nothing more than the bare fact that in the purchase of the various properties involved the money for such purchases was received from Johnson. Especially is this true in the light of the fact that the cornerstone of the government's case was that Johnson was the owner. Based largely on Goldstein's testimony, the government has succeeded in convincing the jury and court after court that such was the case." The district court on motion to modify the order stated with respect to the government's contention that Johnson purchased the property (AR. 178): "I don't think there is any doubt about it. He owned it. I never had any doubt about it." Answering contention of counsel that the building was not owned by Johnson the court said (AR. 179): "You haven't shown that. The evidence is overwhelming that it was. He said he did. His counsel said he did."

²⁶ The Government, like the trial court (AR. 166) relies heavily on the opening statement of Judge Thompson, counsel for Johnson at the time of the trial, to the effect that Johnson owned an interest in the Albany Park Bank Building (Gov't Br. 16, 37, 41, 43, 78, 86). This same point has been raised and an-

falsity of this testimony, however, evidence demonstrating that Goldstein falsely swore with respect to delivery of the deed to Johnson demonstrates a false swearing in an important particular with respect to this property.

In proving such falsity defendants are not concerned whether the proof shows that Goldstein, his son Theodore, or Skidmore was the actual owner. Defendants show merely that Goldstein in stating that there was a quit claim deed to Johnson (and thus supporting his other statements of receipt of the money from Johnson) swore falsely. Defendants' proof with respect to this property goes not only to show that Goldstein swore falsely at the trial but as well to show that he swore falsely in later affidavits or in the income-tax returns he filed on behalf of his son. These make plain that Goldstein cannot be believed under oath at any time.

On the original motion for new trial, the affidavits and other evidence in support of the motion showed that title to the Albany Park Bank Building was transferred to Ted Goldstein, William Goldstein's son, on July 6, 1937 (R. 151-152) and the deed was recorded July 9 (R. 151). The stock

swered repeatedly. The Government did not rely on this statement at the trial. "Where the party is in a courtroom and the trial or other judicial proceeding is going on, the failure to deny statements made public by another person in the course of the proceedings would obviously admit of no inference against him whether he attends as party or merely as witness; and in either case he is prevented by the dictates of decorum from making open interruption and he knows that he may at the proper time make all necessary denials." 4 Wigmore, *Evidence* (3d ed.) sec. 1072, p. 86. When Johnson took the stand, he corrected and withdrew the admission of his counsel by an express denial that he owned the building and by his testimony that he did not employ Goldstein to buy it and never gave him any money to make the purchase (2 MR. 955).

In his reply brief in answer to the contention, for the first time there raised by the Government, that this statement was to be considered in the circuit court of appeals on the original appeal, Judge Thompson fully explained the reason for his inadvertent statement and retracted it specifically (R. 334). As Judge Thompson there pointed out, this was not an admission made during the course of the trial for the purpose of dispensing with proof and the prosecution did not rely upon the statement as an admission or as taking the place of proof. Some indication of the desperate stance in which the Government finds itself is afforded by the fact that the Government deems it necessary to resort to impugning the ethics and integrity of counsel, no longer in this case and hence unable to here defend himself, despite the fact that he has honorably served as Chief Justice of the Supreme Court of Illinois, President of the local bar association, and is a member of the bar of this Court in good standing.

of the Albany Park Safe Deposit Vault Company was also transferred to Ted Goldstein as a part of the same transaction. By an instrument dated July 7, 1937; and reciting that he had purchased the property from the Albany Park Safe Deposit Vault Company, Ted Goldstein leased part of the same premises back to the Vault Company for one year for a so-called consideration of \$10.00 and "other good and valuable considerations" (R. 154). In September 1941 Goldstein, executing the instrument as agent for his son Ted, leased the building for a period of five years from October 1, 1941 to the Hines Realty & Construction Company, of which one Frank Sampson was and is the president (R. 202-204). Attached to the lease is a rider providing among other things for the transfer to the lessee of all the stock of the Albany Park Safe Deposit Vault Company, the resignation of all the Vault Company's officers and directors, and the delivery of its books of record (R. 205). The books of the Vault Company show that William Goldstein and Louis Levinson resigned and were succeeded by Frank Sampson and others (R. 201). Since that time Goldstein has collected the monthly rents of \$250 (commencing October 1943, \$300) under the lease and has cashed the rent checks for his private account after endorsing them "William Goldstein, Agent" and then "William Goldstein" (R. 199, 200-201).

It is important with respect to the facts above recited and the facts that follow to note that Goldstein in affidavits submitted in opposition to the motion for new trial stated that in the early part of 1940 he was served with a notice of lien by the Internal Revenue Collector's office to hold all moneys and property belonging to William R. Johnson and that he was retaining the rent moneys because of such notice (R. 252, 261). The fact that he transferred the vault company stock to the Hines Company in making the lease

In 1941 after service of the notice of lien (R. 202-204), shows that he did not consider this stock to be Johnson's although it was acquired as part of the same transaction for which he said Johnson gave him the money.

In July 1943 the County Treasurer instituted a tax receivership proceeding against the property (R. 198-199). Goldstein offered on July 26, 1943 to pay \$150 per month to apply on the delinquent real estate taxes and on the next day, July 27, offered to pay \$250 per month to apply on the delinquent taxes²⁷. Both of these offers were refused (R. 198-199). This can be explained only on the theories: (1) that he had not given Johnson a quit claim deed to the property and the rent moneys were therefore not Johnson's, or (2) that Goldstein was volunteering money out of his own pocket since all of Johnson's money was by him stated to be 'subject to lien', or (3) that there was no lien filed by the Government. The Government by presenting the affidavits vouches for the existence of the lien, and it is in its nature incredible that Goldstein after this trial would in effect contribute money from his own pocket to pay Johnson's taxes (in the light of the Government lien on all rent income). At the insistence of the County Treasurer's office, he paid a premium of over \$300 for insurance on the property (R. 206-212). It is also clear by the same process of elimination that this payment is explainable only on the theory that Johnson had no interest and Goldstein was paying the money for himself or on behalf of his client Skidmore. On two different occasions, July 27 and July 28, Goldstein, in demanding termination of the receivership,

²⁷ A patent absurdity is the suggestion of the Government (Br. 102) "The very fact that a tax lien came into existence after the trial indicates that the true owner can hardly be Goldstein." Aside from the fact that the evidentiary issue is simply whether the owner was or was not Johnson, it is obvious that the state tax lien would, regardless of owner arise against the property if the real estate taxes were not paid.

unequivocally asserted to Blockus, an employee of the County Treasurer, that he was the owner of the property, stating, "That is my building," "That is my property," "The property is mine, you will have to remove the receivers from my property" (R. 198-199). Goldstein also asserted that the Federal Government had a lien against the property and if the County Treasurer did not accept his offer of \$250 per month he (Goldstein) would turn the property over to the Government.²⁸

The trial court (R. 493) wrongly confined the Leo Blockus affidavit to conversations on July 28, 1943 and relied on affidavits of Levine and Frank Sampson that they attended the Goldstein-Blockus conference on that date and did not hear Goldstein make these statements.²⁹ The trial court's opinion ignores the fact that the Blockus affidavit clearly states that the same representations as to ownership were made by Goldstein on the prior day, July 27 (R. 198-199). This was uncontradicted save by Goldstein.

The circuit court of appeals (AR. 214) pointed out there was no answer to the question: If Johnson had been deeded the property—"why was Goldstein so interested in pre-

²⁸ The offer of \$250 per month from the rentals was inconsistent with the assertion of the existence of the lien. The tax lien extends to "all property and rights to property, whether real or personal" belonging to the taxpayer (26 U. S. C. sec. 3670).

²⁹ The circuit court of appeals (AR. 214) pointed out that the affidavits of Leon J. Levine and of Frank Sampson (R. 262-263) related only to the conference on July 28 and while they therein stated that they did not hear Goldstein tell Mr. Blockus that the property was his, it is significant that Levine by a subsequent affidavit (R. 262) admitted that he could not know what was said between Goldstein and Blockus as they had been talking before he arrived at the office of the County Treasurer. Levine further stated that Mr. Sampson did not arrive until after Mr. Levine did (R. 228-229).

The court also pointed out that strong corroboration for Blockus appears in the very fact that Goldstein was at the Treasurer's office attempting to settle the claim for taxes. It said (AR. 218):

"If, as he testified at the trial, this property belonged to Johnson, why was Goldstein so interested in preventing the property from being sold at tax sale?"

venting the property from being sold at a tax sale? Blockus certainly could have had no motive in making a false affidavit as to what Goldstein stated, and we see no basis for a finding other than that his testimony was true, and that of Goldstein false."

The affidavit of Frank Sampson submitted in support of the amended motion for new trial (AR. 76-79) showed that January 3, 1944 a new lease of the same building for a period of ten years beginning October 1, 1946, was executed by Theodore Goldstein (AR. 79-81). This affidavit shows that Goldstein in November 1943 refused to give an option for extension of the existing lease until the court ruled in the "Johnson case" then pending before Judge Barnes (AR. 77). To a direct inquiry by Sampson, Goldstein replied, "Johnson never had any interest in the property and has nothing whatever to do with it" (AR. 78). It cannot reasonably be argued that this denial that Johnson ever "had any interest in the property"³⁰ is not directly in conflict with Goldstein's trial testimony that he delivered a quit claim deed to the same property to Johnson. The Sampson affidavit is important also in that it shows he demanded of Goldstein that the lease be "signed by his son, Theodore Goldstein, who was the owner of the property rather than William Goldstein, as agent * * *," and pursuant to this request William Goldstein procured the signature of his son as lessor (AR. 78). These statements are opposed only by the denial of William Goldstein (AR. 100).

³⁰ The Government explains this affidavit with a rare bit of speculation for which not even a slight basis in fact is suggested (Br. 103): " * * it seems reasonable to conclude that Goldstein made some sort of statement that was misinterpreted by Sampson, such as that Johnson *had never taken* any interest in the building and *has had* nothing whatever to do with it." Aside from its sheer frivolity, such an hypothesis is conclusively negated by the affidavit of Goldstein himself (AR. 100): "I never did make such a statement to Sampson or *any statement like it.*"

There is no suggestion of motive on the part of Sampson to lie. The trial court although it noticed this affidavit (AR. 162-163), did not discuss it. The trial court merely asserted that the new lease had no greater evidentiary value than the earlier one (AR. 166-167).

The circuit court of appeals said:

"We suppose according to this reasoning, if Goldstein should lease this property from now until eternity and retain the rents as long as he lives, it would not be inconsistent with his testimony that he purchased this property for and conveyed the title to Johnson. Further, it would not be inconsistent with the Government's theory that Johnson was the owner. We do not agree with such reasoning. We think this circumstance alone, unexplained as it is, comes close to establishing the falsity of Goldstein's trial testimony" (AR. 220).

It is pertinent to note that Goldstein in his affidavits on the original motion for new trial states that he is holding the rent moneys collected under the lease made in October, 1941 and the \$7500 escrow moneys returned to him by the State Bank and Trust Company of Evanston subject to the "notice" of lien by the United States served on him in the early part of 1940 (R. 252, 261). But Goldstein makes no claim that he ever was authorized to act for Johnson as agent in the management of his property. He admits that he has never made any report to Johnson concerning the rentals and has never advised Johnson of the fact that the building was rented or tendered any of the rents to him (R. 253).

Miss Sommer, an employee of Goldstein from January, 1938 to June, 1939 swore that Goldstein caused income and disbursement statements "of the operation of the Albany Park Safety Deposit Vault Co." to be prepared monthly in

his office and forwarded to William R. Skidmore (R. 165-166).³¹

To show falsity of Goldstein's testimony respecting the Albany Park Bank Building, important new evidence was adduced on the amended motion for new trial, namely: the delinquent tax returns for the years 1937-1940, and amended returns for 1941-1943 (Exs. C-1 to C-7 inclusive (AR. 47-74)) signed by Theodore Goldstein and filed for him July 17, 1944 and September 23, 1944 and the tax thereon paid by William Goldstein as his agent (AR. 99, 102). In evaluating the probative effect of these returns it is important to have in mind that the motives of William Goldstein may well have suffered modification by reason of the death of William Skidmore on February 19, 1944 in the federal penitentiary at Terre Haute, Indiana. With the death of Skidmore there was open for Goldstein the possibility of retaining the title and the income from the Albany Park Bank Building. Admittedly his son had record title, Johnson had denied title, and Skidmore was no longer alive to claim it. Furthermore, if Skidmore's estate should claim it—and Goldstein continued to act for the estate—the additional tax on income for 1937 consequent upon inclusion in Skidmore's income for that year of an amount equal to the purchase price of the Albany Park Bank Building coupled with ordinary interest and the 50% fraud penalty (26 U. S. C. sec. 293(b)) would obviously make the cost of claiming it for the estate exceed its value. Goldstein may well have thought that by virtue of his services to Skidmore and the risks taken in his behalf he had earned

³¹ The Government's suggestion (Br. 52, n.) that the Sommer affidavit is refuted by Goldstein's submission of typed copies of income and disbursement statements prepared by a Miss Koop, an employee at the Vault Company (Br. 52, n) overlooks that a real estate agent transmits only a summary statement; the longhand statements prepared by Goldstein and typed by Miss Sommer (R. 166) were undoubtedly made up by him from the Koop detailed statements.

The trial court dismissed this affidavit as cumulative, again overlooking that it was directed to a different issue.

the right to have this property. Apparently, it was necessary only for William Goldstein to agree to the payment of taxes on the rentals thereon by his son in order to preserve to him the benefits of such total ownership. At the time it may have seemed to him a safe and profitable solution. These returns, if true, are the first deviation in the evidence from the theory that the purchase money was probably supplied by Skidmore; if false, they are completely consistent with Skidmore's ownership but are inconsistent with the possibility of Johnson's ownership. Cf. appellate court opinion (AR. 219). It is unimportant whether they support the theory of title from 1937 in Skidmore or in Goldstein. *The salient feature of all the evidence is its confirmation that Goldstein lied when he said that he bought the property "for Johnson" and that "subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son" (2 MR. 57).*

The affidavit in question and answer form of Stanley A. Wodrick, a zone deputy collector, filed by the Government in opposition to the amended motion (AR. 102-108) shows that he was assigned to investigate an anonymous telephone communication stating that "the income from the building at 3432 Lawrence Avenue is not reported by anybody and supposedly the rents are paid by the different organizations occupying the property to a William Goldstein, who claims he is agent for Theodore Goldstein." Wodrick interviewed Mr. Goldstein who, when asked who was the owner of the building at 3424 Lawrence Avenue, answered (AR. 103):

"I do not know the owner."

Mr. Wodrick told William Goldstein that since his son was shown by the records to be the owner, he was the person who was to report the rents received from the building.

William Goldstein objected, stating that Theodore was not the actual owner but—

"after a few days, Mr. William Goldstein agreed to have the returns prepared for Theodore Goldstein, showing rent income from the Albany Park Bank Building for the years 1937 through 1943. Mr. William Goldstein said that the reason he *was agreeing or wanted to agree* and prepare these returns for his son, Theodore Goldstein, was that he would like to have the matter closed as soon as possible" (AR. 104) (Emphasis supplied).

The affidavit goes on to show that at the time it was made Wodrick had already prepared tax returns for the years 1937-1939 showing no tax due and had requested copies of the transcripts of the returns already made for 1940 through 1943. The affidavit reiterates that Mr. Goldstein had declared he did not know who owned the property and had stated that—"he received money from persons unknown for the purchase of that building. [(AR. 104)] He also stated that *he didn't know whether it was Skidmore's or Johnson's money.*" In a second affidavit prepared and filed the same day as the answer to amended motion for new trial, December 7, 1944 (AR. 109-110, 87), Wodrick repudiated his affidavit that Goldstein "stated that he received money from persons unknown for the purchase of that building." The Government was obviously dissatisfied with some of the assertions in Wodrick's first affidavit but except for the single correction the affidavit stands. Therefore doubly asserted by Wodrick stands his uncontradicted assertion that Goldstein said that "he didn't know whether it was Skidmore's or Johnson's money" (AR. 104). The fact that Goldstein himself, with no prompting or reference to Skidmore by the agent, brought Skidmore's name into the discussion is highly significant. It is submitted that this statement alone shows that Goldstein's

testimony with respect to the Albany Park Bank Building was both false and misleading, the basis of a fraud and an imposition upon the trial court and the jury. The pertinent portions of the affidavit also state (AR. 105):

"I asked Mr. Goldstein whether the rent money was held in an account for the purpose of returning that money to the person or persons to be later identified as the owners of the building. Mr. Goldstein replied that he merely kept the money, but did not have a special account for that purpose."

Goldstein thus made the damaging admission that he had never segregated the rent moneys from his personal account but had commingled the funds, an act legally inconsistent with ownership in Johnson and with his affidavit that the rent monies were Johnson's and were being held by Goldstein subject to Government lien (R. 252). *People v. Hachtman*, 350 Ill. 326, 329.

The Wodrick affidavit also reiterates (AR. 105):

"The first time he was approached on the subject, he disagreed, stating that Theodore Goldstein was not the actual owner. However, after a few days, I called on William Goldstein and at that time he agreed to have the returns prepared in the name of Theodore Goldstein." (Emphasis supplied.)³²

³² The affidavit also refers to the fact that a statement prepared by Edward H. Schultz, the division chief, in which William Goldstein was referred to as agent for his son Theodore (Gov't Ex. 2-A, AR. 101) for signature by William Goldstein was objected to because it contained the words "the owner" and "purchased for my son, Theodore, in 1937." It was then suggested that Goldstein prepare his own statement and properly sign it (AR. 107; Gov't Ex. 2-B; AR. 101-102). This statement was apparently prepared in order to remove the doubt created by the form of the anonymous telephone call stating that the rents were paid to William Goldstein "who claims he is agent for Theodore Goldstein." Of course the tax payable by Theodore Goldstein who had no other income in some years and relatively little in others would be much less than that payable by William Goldstein who presumably enjoyed a substantially greater income.

Compounding of falsehoods by Goldstein results in inconsistencies such as that between the assertion in this statement that the Vault Company paid the real estate tax for 1939 (AR. 102) whereas, the return claims a loss for that year by reason of payment of the same taxes by Ted Goldstein (AR. 56).

The Government on the same day obtained an affidavit (AR. 89) from Theodore W. Goldstein denying that he was the actual owner of the property and stating he signed the returns because his father told him that the Internal Revenue Bureau had insisted that as record title holder he was required to file amended and delinquent returns for the property in question, and that unless such returns were filed an assessment would immediately be made against the affiant. The affidavit is notable for its deliberate failure to refer to or otherwise confirm the father's testimony at the trial (R. 518) that "there was a quit claim deed delivered to Mr. William R. Johnson by my son."³³ Theodore also carefully avoided saying that he had at any time, or was at that time holding title as trustee for Johnson.

The affidavit of William Goldstein asserts that Mr. Wodrick called on him as many as ten times, and that Mr. Schultz, the division chief, also took the same position as did Mr. Wodrick that returns must be filed by Theodore for a tax period, and that he concluded that if returns were not filed and the tax paid, an assessment would be made against Theodore. He obtained the signature of Theodore to the income tax returns prepared by Mr. Wodrick and paid the tax thereon (AR. 99). The affidavit reaffirms the trial testimony generally and particularly restates that he got the purchase money "from Mr. Johnson in the form of currency." There is no specific restatement that his son

³³ This omission by Theodore to swear to a fact concerning which he was the Government's best available source of information creates a strong presumption that had he been required to testify on this point, the evidence would have been unfavorable to the Government, i. e. that William Goldstein lied at the trial (2 MR. 57) and that no "quitclaim deed [was] delivered to Mr. William R. Johnson by my son." (*Runkle v. Burnham*, 153 U. S. 216, 225; *Caminetti v. United States*, 242 U. S. 470; *Mammoth Oil Co. v. United States*, 275 U. S. 13, 51-52; *Interstate Circuit v. United States*, 306 U. S. 208, 226; *Johnson v. United States*, 318 U. S. 189, 196; *Choctaw & M. R. Co. v. Newton*, 40 Fed. 225, 238; *Henderson v. Richardson*, 25 F. 2d 225, 228.)

gave a quit claim deed to Johnson. This claim was evidently abandoned.

The returns (exhibits to amended motion for new trial, Exs. Nos. C-1 to C-7) conclusively show that Theodore Goldstein by solemn statements³⁴ has averred ownership of the Albany Park Bank Building in himself by returning the rentals thereon as taxable to him. But he has gone further by claiming deductions for depreciation thereon, and, in years of loss, by offsetting such loss against his personal income from entirely different sources (see Ex. C-4 for 1940, R. 59-60). He has affirmatively asserted in himself an interest in the property which is not less than complete legal and equitable ownership. Particularly significant is the delinquent return for 1940 (AR. 59-62) in which Theodore Goldstein reported income on salary of \$2600 received from an independent source, upon which he had never theretofore made a return but in which return he avoided payment of tax thereon by taking a loss of \$1631.08 represented by the excess of depreciation and real estate taxes over the income of \$900 on the building.³⁵ Unless he was the owner of the property, Theodore Goldstein by this return clearly laid himself open to a criminal charge of evasion of income tax by a false claim of ownership, a fact which he and his father as attorneys must have appreciated. It is inconceivable that he and his father would have incurred this risk if Johnson was the owner of the Albany Park Bank Building.

It is highly pertinent to note as well that the schedules explaining the deduction for depreciation appearing in each of these returns (AR. 48, 52, 56, 60, 72) show that the

³⁴ Oaths required on returns 1937-1941 were subject to penal sanctions (18 U. S. C. sec. 231); affirmations to the returns for 1942-1943 were subject to the same sanctions (26 U. S. C. sec. 145(c)).

³⁵ The Government's unsupported contention that an agent may deduct taxes from rentals (Br. 102) even if it were correct, falls short of explaining how an agent may deduct such taxes from his own income from other sources.

date of acquisition of the property was July, 1937. Goldstein testified at the trial that the property was purchased July 16, 1937.

Gross income from the building was includable as Theodore Goldstein's income only if he was the owner since ownership is the established test for determining who is to bear the tax on such income. *Pollock v. Farmers Loan & Trust Company*, 158 U. S. 601; *Eisner v. Macomb*, 252 U. S. 189. Plainly the deduction for depreciation on the full value of the property from the date of its purchase by his father in 1937 and for later years could not be taken by Theodore if Johnson at any time held proprietary interest therein. I. R. C. sec. 23(1); Regs. 111, sec. 29.23(1)-1, 2. Depreciable property is limited to that in which the taxpayer has a special or financial interest. 4 Mertens, *Law of Federal Income Taxation*, secs. 23.06, 23.52, pp. 12, 68. The returns contradict the testimony of Goldstein at the trial that he purchased the property "for Johnson." They even more clearly repudiate Goldstein's testimony at the trial that "there was a quit claim deed delivered to Mr. William R. Johnson by my son."

William Goldstein is conceded to have had full knowledge of these returns, to have actively participated in and agreed to their execution and filing (see Affidavit of Wodrick, AR. 104). Goldstein signed the statement that he was authorized to pay any tax owed by his son on the rental income received from the property (AR. 102). Goldstein certainly knew all the facts concerning the purchase and ownership of the building. Being subject to the same penal sanctions for false swearing if the returns are false (26 U. S. C. sec. 379d) he is equally with his son Theodore chargeable with the admission and assertion contained in the returns that ownership was never in Johnson. Whether they conclusively prove that it was in Theodore Goldstein

or his father or Skidmore is unimportant. William Goldstein thus repudiated his testimony on the trial that he purchased the property "for Johnson" and that Ted Goldstein "subsequently caused a quit claim deed to be delivered to Johnson" (2 MR. 57).

The returns also demonstrate the falsity of William Goldstein's affidavit on the original motion for new trial (R. 252-253) averring that he was holding all rental moneys under a lien served by the Internal Revenue Bureau and demonstrated as well the falsity of his further statement in the same affidavit that Theodore W. Goldstein holds title to the building in trust for Johnson. The returns filed under oath constitute a solemn assertion of ownership, not only ownership of the beneficial but the legal title as well. If Goldstein had wished to preserve the fiction, and it was a fiction, that he had bought the property for Johnson and that his son had given a quit claim deed to the property to Johnson, he would never have permitted the filing of any such returns. To be consistent with his trial testimony that Johnson had received a quit claim deed, and consistent with the theory that Ted was acting merely as agent (R. 512) (Gov't Br. 51, 104) an agent's information return (Form 1099) could have been filed (26 U. S. C. sec. 147(a); Regs. 103, sec. 19.147-1; Regs. 111, sec. 29.147-1). On the other hand, to be consistent with the Goldstein affidavit that title in trust was held by Ted Goldstein and was not transferred to Johnson (R. 253) a fiduciary return (Form 1041) could have been filed (26 U. S. C. secs. 142, 162(b); Regs. 103, sec. 19.142-1; Regs. 111, sec. 29.142-1). In neither of these forms would there have been included any of Theodore Goldstein's individual income or his personal exemption. No tax would have been payable by him by reason of the income from the building since it was, according to William Goldstein, currently distributable by the

trustee to the beneficiary except for the lien of the United States. Or, as an alternative, he might have turned over all the accumulated rents to the Government, said they belonged to Johnson, and washed his hands of the entire transaction.

The Government sees "no justification for any other conclusion than that the returns and the circumstances surrounding their filing show nothing more than what Goldstein testified to at the trial—that his son Theodore * * * was the record title holder." (Gov't Br. 102).³⁶ The Government, without directly so asserting, seeks to create the inference that Wodrick acted on an improper basis in demanding and securing agreement to a return by Theodore after the latter's explanation that he was mere "record title holder" for whosoever owned the property. The Government labors its allegation that the Government agents insisted that Theodore file the return and pay the tax (Gov't Br. 102-103).³⁷ It ignores the statement of its own witness that William Goldstein "agreed" and stated that the "reason he was *agreeing* or wanted to agree and prepare these returns for his son, Theodore Goldstein, was that he would like to have the matter closed as soon as possible" (AR. 104). The trial court accepted the Government's contention that there inhered in the circumstances under

³⁶ The Government's suggestion that taxes are frequently paid first and contested later (Br. 102) in essence is a contention that the returns under oath mean nothing until the statute of limitations on claims for refund have run. Had a claim for refund been filed and a refund awarded on the ground of mistake such award might carry some persuasive weight but the Government cannot argue as though such an award had been made in the absence of even a claim for refund or any suggestion that such a claim would ever be filed, and indeed in the face of Goldstein's statement that the returns were made and the tax paid to close the matter. The trial court itself did not suggest that on the motion the statement and necessary implication of the return could not be given effect by the court.

³⁷ The Government's argument that the returns are not false because of the accompanying written statement that Ted Goldstein is "record title holder" (Br. 102) erroneously assumes that the statement includes the assertion, in fact entirely lacking, that some other person holds actual or beneficial title. The statement thus neither adds to nor takes away from the implications of the returns.

which the returns were filed some legal obstacle—then unnamed and still unnamed—that prevented attributing to them the evidential effect that they would otherwise have (AR. 152, 165). No suggestion is made that the returns are invalid as the result of fraud, duress or mistake.

Goldstein himself secured his son's signature. They acted jointly and deliberately. Neither Wodrick, nor anyone else was present to intimidate them and force them to do something against their will. Both were lawyers and knew the consequence of their acts. Moreover, Goldstein was anxious "to have the matter closed as soon as possible," placed in the confidential files of the Government and forgotten.

Some principle of exclusion more definite than the vague allusion to the "circumstances" must be evolved as a basis for rejecting this plain and compelling evidence of perjury by Goldstein. Otherwise these defendants are denied their plain right and are left without relief through arbitrary whim or caprice.

The circumstances surrounding the filing of the returns and the facts shown to have been uncovered in Wodrick's investigation, far from disputing the legal implication of ownership asserted by the returns, constitute a much stronger case against the Goldsteins for income tax evasion had Theodore refused to file returns, than was made out in this case against any of the defendants.

Goldstein has made admission to Green that his testimony is false.—Green in his affidavit of June 24, 1943, as pointed out above, states unequivocally that in a number of casual conversations since October 1940 Goldstein admitted that his testimony at the trial regarding pur-

chases of property for Johnson were false (R. 100). The same affidavit shows that about March 15, 1942, Goldstein stated to Green and Skidmore that the latter could not file an answer to the partition suit (brought by Johnson in the early spring of 1942 in an attempt to force disclosure of Skidmore's interest (R. 240)) because "such an answer in the Partition suit would definitely establish his testimony in the trial of William R. Johnson as completely false". Skidmore agreed and therefore did not file an answer (R. 101). This is confirmed by the affidavit of Henrichsen (R. 90) who states that during the early part of March he was served with a summons in a case involving the property of the Bon Air Club and the Curran Farm; that Skidmore stated to him that he would not contest the suit involving the property at that time; that he (Skidmore) had in his possession unrecorded quit claim deeds to the Bon Air property and to the Curran Farm and would assert his rights at a later date; and if any more papers were served on Henrichsen pertaining to Bon Air, Curran Farm, or White House, to take all such papers to Mr. Goldstein (R. 90). Admittedly Skidmore interposed no defense in the suit to protect his ownership in the property.

Again in a later affidavit made August 13, 1943 (R. 216) Green states that on August 11, 1943, he met Goldstein outside the bakery where the former was employed and Goldstein upbraided him for making the prior affidavit which had been filed in the circuit court of appeals on the motion for remand, but when Green said Skidmore should tell Goldstein to tell the truth, Goldstein said:

"I can't do that because if I did I'd certainly be disbarred, and I might as well be dead as disbarred" (R. 216).

Green's affidavit shows unequivocal recantation.

Goldstein's affidavit, September 8, 1943, in answer to Green's of June 23, admits the occasional meetings with Green but denies the admissions of false swearing (R. 243). Goldstein in his affidavit dated September 1, 1943 (R. 264) denies entirely the meeting across from the bakery to which Green swears, but proof that Goldstein did meet Green at the bakery is found in the affidavit of the completely disinterested Engelbretson³⁸, proving Goldstein's denials false and corroborating Green.³⁹

Goldstein admitted to Hess that his testimony was false.—Goldstein admitted in the presence of Hess, defendant Johnson, and his brother John E. Johnson, that he lied on the stand, saying "he was sorry that he did but that he was a victim of circumstances" (R. 126, 221, 233).

The Hess affidavit states (R. 127) that Johnson inquired of Goldstein—

"as to why he testified that he bought those properties for me when you know you bought them for Skidmore. Why did you lie?" Goldstein replied in substance that he was sorry that he did but that he was a victim of circumstances and stated that he preferred not to discuss the matter."

³⁸ The Government finds a flyspeck discrepancy in the Engelbretson corroboration (Br. 40, fn. 10). The Government's attack because of minute discrepancy, on the affidavits of Green and Engelbretson is in marked contrast with its attack on those of Hess, Johnson and John E. Johnson, because of their similarity (Gov't Br. 35).

³⁹ The trial court held (R. 478) Green discredited by the number of opportunities he gave himself to talk to Goldstein and by the improbability that Skidmore would seek the advice of a disbarred lawyer and bakery goods salesman on a question of real estate law. The Government makes the same attack (Br. 40) but Goldstein admitted seeing Green on a number of occasions (R. 243). The remaining reason of the trial court ignores the fact that the so-called question of "real estate law" was really the problem of how Skidmore could protect his ownership, protect Goldstein from disclosures of his perjury concerning the ownership, and avoid possible indictment of himself and Goldstein for conspiracy to evade income tax on the income represented by it. Advice on law evasion might well subject the counselor to disbarment and a conspiracy indictment as well. Green was not disbarred for incompetence. What more likely than that Goldstein and Skidmore would seek out a disbarred lawyer who presumably would have so much less to lose by the giving of such advice? Even though they had selected a disbarred lawyer for this purpose, it is obvious and to Green's credit that he refused to be a party to the scheme.

In an interview with a Bureau special agent, Hess refused to clarify the statement as to Goldstein's answer since that was his best recollection.

"Whether Goldstein was endeavoring to excuse himself to Johnson for having testified against Johnson, or was conceding falsity, Mr. Hess would not say" (R. 246-247).

Obviously such a conclusion by a witness would have been grossly improper and Hess merely recognized the fact.⁴⁰ Judge Barnes interpreted this to mean that Goldstein was "sorry he testified at all" (R. 478). This untenable distortion of the Hess affidavit ignores that Goldstein's answer was not addressed to any question as to why he testified. He was asked "why he testified that 'he bought those properties for me [Johnson] when you know you bought them for Skidmore.'" "Why did you lie?" (R. 127.)

● Both interrogations asked why Goldstein lied. Goldstein's answer that he was sorry he did, regardless of the question to which it is deemed addressed, is equally damning and manifestly does not permit of the strained effort of Judge Barnes to avoid the inconsistent statement of Goldstein.

The circuit court of appeals, recognizing the tenuous nature of the district court's interpretation, was amply sustained in its holding that "any kind of logic or reason of which we are aware requires the acceptance of Hess' version as true and that of Goldstein as false" (AR. 213).

The record affords no corroboration for Goldstein.—It is highly significant that since July 13, 1943, when re-

⁴⁰ Assuming, without conceding, that the affidavit of Hess permits of the strained inference made by the trial court, it is nevertheless clear that "It is not allowable for a witness to resolve the doubt as to which of two equally justifiable inferences shall be adopted by drawing a conclusion." *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 340. Plainly, this principle may not be circumvented by drawing an inference from the failure of the witness to draw the unallowable conclusion.

spondents first presented their motion to the circuit court of appeals for remand supported by all but two of the affidavits upon which they relied in the trial court, the Government has been unable to bring forward a single witness to support Goldstein in his numerous denials of the affidavits of ten or more of the witnesses presented by the respondents. Although the Government insists that the evidence brought forward by respondents is merely impeaching, its only support for Goldstein lies in his affidavits in attempted reiteration of his trial testimony, and there are obvious inconsistencies in these as pointed out above.

The Government insists that Goldstein's testimony was in large part corroborated by the trial record (Gov't. Br. 16, 17, 20, 92, 93, 96, 102). Most frequent reference is made to the purchase of Sunny Acres Farm and adjoining DuPage County real estate. Goldstein testified that Johnson asked him to take up the matter of the purchase of Sunny Acres Farm with the seller's representative, but that after a price was agreed upon, Johnson personally brought the money to the bank where the escrow was executed and with Goldstein counted the money out. Title was taken in the name of Johnson (2 MR. 60). Johnson confirms this (3 MR. 982-983). As to the adjoining DuPage County property, Goldstein testified that he bought the property at the request of Johnson with money given to him by Johnson and took title in the name of his law partner, Isadore Goldstein. Subsequently, a quit claim deed was delivered to Johnson (2 MR. 60). Johnson merely testified that Goldstein handled the purchase for him (3 MR. 982). Johnson's purchase and ownership of Sunny Acres Farm and adjoining DuPage County real estate has never been denied by Johnson. There was no controversy about the ownership, the cost or the method of acquisition of these properties. The facts concerning these properties can only be urged

as corroboration of Goldstein on the theory that if Johnson utilized Goldstein in the purchase of two parcels of property he must be assumed to be the owner of all the real estate Goldstein ever purchased.

There is no validity in the Government's argument that because Johnson testified that Goldstein bought the Du Page County real estate for him and Goldstein testified that he purchased that property with currency received from Johnson and with title taken in the name of a nominee and quit claim deed subsequently delivered to Johnson, the evidence of this purchase corroborates Goldstein's testimony that Johnson gave him the money for the purchase of 9730 Western Avenue, the Dells, Albany Park Bank Building, and Bon Air, since in each instance the same pattern of concealment was used by Goldstein: payment in currency, title taken in the name of a nominee and quit claim deed subsequently delivered to Johnson (Gov't Br. 19-20, 25, 93, 96, 101.)¹¹

It is quite obvious that on the two parcels of property in the purchase of which Goldstein acted for Johnson radically different "patterns" were employed. In one Johnson himself paid the money to the agent for the seller, took title directly in his own name. In the other relatively minor transaction Goldstein purchased the property, took title in the name of a dummy and gave Johnson a deed. Johnson openly acknowledged to the world his full ownership of both these parcels of property. These transactions

¹¹ The Government also urges repeatedly that because Goldstein's testimony as to the purchase of Sunny Acres Farm and adjoining DuPage County property was true, this makes against acceptance of the Green affidavit that Goldstein made a general admission that his testimony "regarding purchases of property" for Johnson was false (Gov't Br. 41, 96). Green did not say that Goldstein told him that every single word he uttered concerning the purchase of any property whatsoever for Johnson was false, and the defendants have made no contention to this effect. Green said Goldstein admitted committing perjury regarding purchases (R. 100) and the record evidence shows that on every contested statement Goldstein testified falsely.

can hardly be a basis for an inference that Johnson always purchased property in the name of a nominee and concealed his ownership in it. They may, however, afford basis for an inference that Goldstein, left to his own devices as a purchase agent for any client, took title in the name of a dummy and gave his client a quit claim deed. In any event no inference can be drawn from these transactions which in any degree corroborates Goldstein's controverted trial testimony.

The Government also relies heavily on the opening statement of Johnson's attorney, Thompson (Br. 17-19). The repudiation of this statement has been pointed out above (supra, p. 50, n. 26). The Thompson statement, as quoted by the Government (Br. 18), includes an indication of an omission which is peculiarly important. The omitted portion of the sentence reads: "the Government says in this indictment", (2 MR. 4). This supports Mr. Thompson's statement made to the Circuit Court of Appeals that he based his opening statement on what he was able to learn in the few hours between the time he was retained on the afternoon of the day before the trial, and the time he gave his opening statement (R. 534). In part, this was based on what the Government said in the indictment and in the opening statement of the prosecutor, as a reading of the stenographic record of his opening statement makes plain. (See Stenographic Transcript, Bill of Exception Vol. IV, pp. 34-35, 52, 57, 80).

~~Plainly absurd is the argument~~ (Gov't Br. 20) that, because Goldstein delivered deeds of full title to Bon Air to Johnson in July, 1939 and simultaneously, took back quitclaim deeds for one-half interest to Skidmore (R. 164, 188), there is warranted the inference that Johnson gave Goldstein money to make the purchases at the time of the acquisition of the property in December, 1937. Peacock,

associate of Goldstein (2 MR. 62), first took title as trustee of Bon Air, in December, 1937 upon nomination of Goldstein (R. 188, 194), at the time that the property was purchased, according to Goldstein's testimony (2 MR. 57). About sixteen months later, title was transferred to Johnson with a one-half interest quitclaim back to Skidmore in July, 1939. (R. 163, 178)

The formal transfer to Johnson so long after the purchase tends no more strongly to support the inference that Johnson supplied the purchase money than that it came from Skidmore. Particularly, is this so when regard is had for the fact that Skidmore was Goldstein's client.

The basic frailty of the Government's argument as to corroboration appears in the statement (Br. 20):

"Johnson's admission that he had a one-half interest * * * made it as likely as not that he had been the one to give Goldstein the money to purchase the properties."

We had not supposed that evidence giving equal support to either of two inconsistent inferences would in this Court be urged as sustaining either. The contrary is too well established. *Gunning v. Cooley*, 281 U. S. 90, 91; *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 339.

Neither is there support in the record for the premise that Johnson was the one person, shown by the record, to transact his business in cash. (Gov't Br. 20, 93). Skidmore, as is shown above, (p. 21, n. 13) had large sums of cash available and transacted business with such sums. Even if the premise were true, the conclusion is fallacious. For even if Johnson were the one man shown in the record to have large sums of cash, this would not prove that others outside the record did not have large sums of cash, and cer-

tainly, Goldstein was not confined in the source of large sums of currency to persons embraced by this record.

The only remaining corroboration of Goldstein urged by the Government (Br. 21, 31) is testimony of an Internal Revenue Agent that Johnson admitted ownership of the 9730 Western Avenue property and the Bon Air Country Club. This asserted corroboration falls of its own weight in view of the Government's admission that Goldstein proved Johnson had only a one-half interest in 9730 Western Avenue (Gov't Br. 115). The agent's testimony of the alleged admission by Johnson therefore must either be taken as corroborating a statement that Johnson had only a one-half interest in these properties or as contradicting Goldstein.

The circumstances indicate that Johnson told the truth.—The veracity of Johnson is important on the question of Goldstein's false swearing, because his testimony on the question of whether he supplied Goldstein with the purchase money is the testimony of the only person other than Goldstein who could know the facts.

The Government, in effect, takes the position that Johnson did not tell the truth on the stand, but did not testify falsely on all things. It argues that he should be believed in his testimony that is against his interest and disbelieved when it is in his interest. For example, at the end of the Government's case, there is evidence, if believed, tending to show an excess of expenditures over reported income of \$474,349.54 (Gov't Br. 22). When Johnson took the stand, he testified to various additional expenditures not theretofore charged against him by the Government, which totalled some \$200,000 and testified to assets at the beginning of the second period, amounting to some \$140,000, or some \$150,000. (3 MR. 960.)

The Government relies on the testimony as to the \$200,000 expenditures and rejects the claim of \$140,000 for assets (Gov't Ex. 22). The important feature of this testimony is that it is hardly reconcilable with that aversion to the truth which the Government asserts characterized Johnson's testimony whenever the truth might hurt his case.

Even if we exclude from consideration all testimony of Johnson, favorable to him, this would not exclude his testimony denying the giving of purchase money to Goldstein. It was testimony that could only hurt him. Goldstein testified that Johnson gave him all the purchase money for 9730 Western Avenue (2 MR. 56, 65), but on cross examination, he admitted Johnson had given deeds for only a half interest (2 MR. 64-65).

If Johnson were indifferent to the truth and concerned only with his own interest, he could have avoided any conflict with Goldstein's testimony and avoided also any adverse effect from such testimony by admitting the giving to Goldstein of purchase money, and by going on to explain that Skidmore had paid him one-half that amount ~~held~~ before ~~and~~ after the payment to Goldstein.

But Johnson forebore to take this easy mode of explanation because it was contrary to the truth. His natural interest did not lie in the direction of his testimony, but he, nevertheless, elected to state the facts as he knew them. On the other hand, Goldstein was under the strong pressures indicated above to testify that he received the purchase money from Johnson in order to conceal the Skidmore interest. When regard is had for the fact that Johnson voluntarily gave testimony which was necessarily against his own interest, it is apparent that there is present

a strong reason for believing Johnson rather than Goldstein.

The conclusion of the appellate court that the trial court's finding that Goldstein did not swear falsely, was without support in reasoning or logic, is amply sustained by the evidence. That he did swear falsely, is also convincingly demonstrated by the evidence.

Aside from this, however, it is clear from the argument of the Government itself (Br. 84-90) that Goldstein by his testimony sought either skillfully to misguide the jury or to commit nonprovable perjury, one or the other. The Government does not attempt to refute this proposition.

One who is capable of thus willfully misleading a jury so as to imperil the liberty of others, can have no great compunction about false swearing. The blurred line is easily obscured entirely. Ordinary justice, of course, would require a new trial regardless of whether Goldstein was guilty of false swearing or of bad faith in such crucial testimony, but here, as the circuit court of appeals held, the affidavits of Goldstein afforded "no substantial support for a finding that he testified truthfully at the trial" (AR. 225); and the proof "unerringly points to the fact that Goldstein's trial testimony was false" (AR. 227).

2. Without the testimony of Goldstein, the jury might have reached a different conclusion.—There can be no serious question that the second requirement of the *Larrison* case is satisfied.

Questions of Guilt on Original Trial Was Narrowly Balanced.—From the beginning the question of the guilt of Johnson and the other defendants has been a matter of

serious doubt. For the very grand jury, impaneled for the December 1939 Term, that returned the indictment in the instant case against Johnson and the other respondents, charging Johnson with ownership of gambling houses and with having received all the income therefrom, did at the same term also return separate indictments against the defendants Sommers, Hartigan, and Kelly charging, not that Johnson, but that they individually received the entire income from the gambling houses managed by them as their own.⁴²

On the trial more than twelve hours were required by the jury to reach a verdict. On appeal, the circuit court of appeals held that the verdict could not be supported on the ownership theory: that Johnson was the owner of a full or part interest in the gambling houses (123 F. 2d, 111, 124). In this Court, argument was had April 10-13, 1942. On May 4 following, this Court on its own motion ordered reargument directed solely to question as to the sufficiency of the evidence.⁴³

Reargument was held October 12, 1942. Almost eight months elapsed before this Court on June 7, 1943 an-

⁴² Copies of these indictments have been lodged with the clerk.

⁴³ The journal for May 4, 1942 contains the order of this Court directing:

"For purposes of the reargument, the briefs with appropriate record citations and arguments of counsel will be directed solely to the following questions:

"(1) What evidence warranted submission by the trial court to the jury of the charges made as to each of the defendants (a) in each of the four substantive counts, and (b) in the conspiracy count?

"(2) In the circumstances of this cause, is proof of gross receipts sufficient to establish that net income resulted from the operation of any enterprise in which respondent Johnson is alleged to have been interested?"

"(3) To sustain the sentence of respondent Johnson on the first four counts, on petitioner's 'expenditure theory', must the record furnish proof that during some one of the four years referred to in those counts his expenditures exceeded reported income, and were made in part from his unreported income received in that particular year?

"(4) If so, does the record furnish such proof?"

nounced its decision holding the evidence sufficient and reversing the circuit court of appeals (Mr. Justice Roberts dissenting). 319 U. S. 504.

Aside from this record indicating the delicately poised nature of the evidence,⁴⁴ it is pertinent to note the further action of the United States Attorney in the individual indictments against Sommers, Hartigan, and Kelly mentioned above. While the instant case was still pending in this Court, the United States Attorney in the cases in which these defendants had been independently indicted filed bills of particulars alleging that they are the real owners of the gambling houses and that they received as their personal income the very same income with which in this case Johnson is charged.⁴⁵

The question whether Goldstein's testimony was prejudicial is not open here.—The Circuit Court of Appeals held (A. R. 209): "That Goldstein's testimony was material and, if false, was highly prejudicial to the defendants, is not in dispute." The Court held (A. R. 228): "We think we need not labor the point that the jury might have reached a different conclusion without it. In fact, it was upon his testimony that the Government placed much reliance, that Johnson was the owner of certain properties, by reason of which he was charged with all of the purchase price as well as with the enormous expenditure made thereon."

⁴⁴ If on the original trial Goldstein had not testified falsely, it is clear that some jurymen might think (as Mr. Justice Roberts and as Judges Sparks and Major apparently thought from the language of their opinions, 319 U. S. 503, 520; 123 F. 2d 111, 124) the so-called ownership (of gambling houses) evidence too speculative to be a basis for conviction. The jury would certainly have been charged that as against the co-defendants the expenditure evidence standing alone did not even tend to prove a case, and as against the defendant Johnson they would have been charged that the expenditure evidence was legally insufficient and in any event probably would have found it insufficient to eliminate all doubt of guilt.

⁴⁵ Certified photostatic copies of these bills of particulars have been lodged with the Clerk.

The Government neither assigns nor specifies error with respect to these rulings. Furthermore, points not raised but waived below will not be considered here. *Helvering v. Wood*, 309 U. S. 344, 349; *Kay vs. U. S.* 303 U. S. 1, 5.

It is therefore submitted that the question of the materiality of Goldstein's testimony is not open here. If a mere reference in a petition for certiorari to a ruling without a request for review will not cause its consideration (*Connecticut Ry. Co. v. Palmer*, 305 U. S. 493, 497) a fortiori that ruling will not be considered when it is not even mentioned.

But the Government, while not specifying the ruling of the Court as error or setting its contention out as a point in its brief, nevertheless, argues extensively that Goldstein's testimony was immaterial because it bore but little on the ownership theory and the evidence under that theory alone was sufficient to support the convictions, (Br. 10-12, 113). It also argues that the great bulk of the newly discovered evidence was designed to prove that Skidmore had an interest in Bon Air, whereas the crucial issue was whether Johnson, in fact, made the expenditures thereon (Br. 23, 29) and that the record contains evidence on this latter issue other than that of Goldstein (Br. 88, 115). It also argues that even under the respondent's own computation, there was an excess of expenditures over reported income of \$42,000. We proceed to show that none of these contentions are tenable.

Goldstein's testimony was used not on the expenditure theory alone, but was of great importance under the ownership theory as well.—The Government's contention here constitutes a clear reversal of the position taken by it in the original argument in this Court (Gov't Br. 797, 800, O. T. 1941, page 51):

Moreover, the court erred in assuming that the so-called 'ownership' and 'expenditure' theories were wholly independent of each other. They were not. Each gave support to the other. The showing that Johnson had expended large amounts of money in excess of his stated resources fortified the conclusion that he was the owner of the gambling houses with which he had been identified. And the evidence of his participation in the affairs of the gambling houses made reasonable the conclusion that his large expenditures were made from income that was derived from his ownership of the gambling enterprises."

The same position was taken by the Government on the reargument (Gov't Br. in Nos. 4 and 5, O. T. 1942, p. 5):

"The 'ownership' and the 'expenditure' theories are thus not separate and distinct branches of this case. It is erroneous, we submit, to attempt to isolate each theory, and to search the record for support of each. The correct approach is to consider them together, since each offers substantial support for the other."

On the original motion for a new trial, Judge Barnes stated (R. 465):

"Since the trial, the parties, from time to time, have referred to two theories of guilt—the ownership of gambling house theory and the 'expenditures' theory. But, to separate the evidence touching these two theories and to view the case as presenting only evidence pertinent to one or the other is to assume an artificial viewpoint and one that the jury did not have."

This Court treated the two theories as being inter-related, holding 319 U. S. 503, 517:

"That he [Johnson] had large, unreported income, was reinforced by proof which warranted the jury in finding that certainly for the years 1937, 1938 and 1939, the expenditures of Johnson exceeded his available declared resources."

Goldstein's testimony was relied upon as a material element of the proof under the ownership theory.—The contention that Goldstein's testimony was not important under the "ownership" theory, is not consistent with the importance placed thereon in the Government's brief or reargument in this court, Nos. 4 and 5; O. T. 1942, developing the so-called ownership theory.

In that brief under the heading "The Operation of the Gambling Houses as a Unit" (p. 9), the Government stated (pp. 27, 29-30):

"From June 1936 to July 1938 banking transactions of the Horseshoe, Lincoln Tavern, D & D Club and Harlem Stables were handled at a single currency exchange; the Albany Park Currency Exchange, through a single account. * * * [Gov't Br. on Rearg., p. 27.]

"In July 1938 all of this business was taken away from the Albany Park Currency Exchange (2 R. 477-478). * * * Brown opened the Lawrence Avenue Currency Exchange [in the Albany Park Bank Building] near the Albany Park Exchange in July 1938 (2 R. 478, 532). Sommers, Hartigan and Kelly stated to revenue agents that they cashed checks at the Lawrence Avenue Exchange (2 R. 459, 463, 468). The Lawrence Avenue Exchange carried all of this business as a single account. * * * [Gov't Br. on Rearg., pp. 29-30].

In the same brief on reargument at page 30 and under the heading "The Ownership of Johnson" the Government stated:

"Johnson was shown to be the owner of the building in which Brown's currency exchange, the Lawrence Avenue Currency Exchange, was located (2 R. 56-57). [The record reference is to Goldstein's testimony as to the purchase of the Albany Park Bank Building.] This latter building was purchased by Johnson on July 16, 1937 (2 R. 57). [This record

reference again is to Goldstein's testimony as to the purchase of the Albany Park Bank Building.]"

Goldstein's testimony as to the Bon Air purchase was highly material with respect to the propriety of charging all expenditures thereon to Johnson—The argument that the question of whether Skidmore owned a half-interest in the Bon Air is unimportant (Gov't Br. 23, 114) ignores the fact that the question of who should properly be charged with having made the \$548,000 expenditures thereon in 1938 and 1939 turns in large part upon who was the owner of the property, i. e., upon whether the purchase money was all Johnson's as might be inferred from Goldstein's testimony that Johnson supplied the currency and was given a quit claim deed to the property (2 MR. 58).

The Government argues that Johnson admitted to revenue agents and stated to accountants that he alone had paid for the Bon Air properties and improvements thereon (Br. 115). It cites to its statement of facts (Br. 30-31) but reference to the matter there cited will disclose that the statement to the accountant (2 MR. 53-54) was merely a direction to remove original construction and equipment cost figures for 1938 from the books of the Catering Company since they were not assets of the corporation, and that the accountant testified merely: "They were assets, I presume, of Mr. Johnson."⁴⁶

The Government refers to the testimony of revenue agents (Br. 31) that Johnson admitted ownership of the

⁴⁶ The Government also relies (Br. 31) on the fact that no partnership returns were filed by Johnson and Skidmore although Johnson said he and Skidmore were partners in ownership of Bon Air and Western Avenue. (3 MR. 983). No partnership returns were required because Johnson and Skidmore were merely joint owners of the property and not conducting a business. There is no suggestion that they jointly operated a business at 9730 Western Avenue. Bon Air operations were conducted by the Bon Air Catering Company, Inc. (Gov't Br. 30). The legal distinction between a partnership in the legal sense of a business and the mere co-ownership of property to which Johnson referred is elementary. Crane, Partnership (Hornbook Series) sec. 12, p. 39.

Bon Air property. This alleged admission went equally (as the Government's record citations in support ("2. R. 117-118; 4 R. 8" (Br. 31)) show) to both the Bon Air and 9730 Western Avenue properties. Since the Government concedes that Johnson had only a one-half interest in 9730 Western Avenue (Br. 14, 25, 115) the same statement that Johnson made to the agents with respect to 9730 Western Avenue cannot be taken as proof of sole ownership in one case and of one-half ownership in the other. If the alleged admissions cannot be reconciled with conceded facts they must be rejected. If they can be reconciled, then they go only to corroborate Johnson's trial testimony and defendant's motion evidence.

Furthermore, the Government's argument that the verdict could possibly be sustained in the absence of Goldstein's testimony mistakes the question. It overlooks the fact that as held in the *Larrison* case, to determine whether the false swearing was prejudicial, the question is whether Goldstein's testimony *might* have influenced the jury in reaching its verdict. That the jury might well have relied upon the expenditure theory rather than the ownership theory is evidenced by the fact that two members of the Circuit Court of Appeals on review of the case on the merits felt that the testimony going to expenditures was the only testimony that had any persuasive weight, and that the testimony going to ownership was too speculative. *United States v. Johnson*, 123 F. 2d 111, 124. And Mr. Justice Roberts dissented on the ground, *inter alia*, there was no evidence whatever to prove that the co-defendants aided or abetted Johnson. Since the ownership theory required acceptance of the co-defendants as aiders and abettors of Johnson, this shows that Mr. Justice Roberts thought only the expenditure theory to be tenable on the evidence.

Under the falsus in unus charge, the Goldstein testimony contradicting Johnson was plainly prejudicial.—Without stopping now to detail the inaccuracies in the Government's computation, (See fn. 10, p. 11, *supra*) it is sufficient to note that the invalidity of this contention as to immateriality of the false testimony is apparent from the fact that Johnson directly, categorically, and completely denied the truth of Goldstein's testimony with respect to all of the properties involved about which there is any controversy (3 MR. 955-957). But for Goldstein's testimony, therefore; the jury would not have been authorized, as it was, under the charge of the trial court, to disregard all of the defendant Johnson's testimony. The trial court instructed the jury that it was at liberty to disregard all the testimony of any witness if it believed any of his testimony to be false (3 MR. 1006). In view of the clear conflict either Johnson or Goldstein lied. The jury could not believe Goldstein without believing Johnson's testimony to be at least in part false. Therefore, believing Goldstein, the jury was at liberty under the charge to reject all of the defendant Johnson's testimony. The prejudicial effect of this fact cannot be gainsaid in view of this Court's statement in its opinion (319 U. S. 503, 516):

"* * * During the course of his extensive testimony, Johnson himself put simply and completely the only real problem before the jury when he swore that he 'never had any financial interest in any gambling club operated by any of the defendants.'

"The jury decided this central issue against Johnson."

If the jury had believed Johnson, and it cannot be denied that they *might* have done so in the absence of the conflict of Goldstein's testimony, they would clearly have reached a different result. That false testimony presenting a square

contradiction of a defendant's testimony; in a case in which the "*Falsus in unus, falsus in omnibus*" charge is given, is prejudicial to the extent of requiring a new trial is well established. *Pettine v. New Mexico*, 201 Fed. 489, 493 (C. C. A. 8); *State v. Mounkes*, 91 Kan. 653, 138 Pac. 410, 411, cited with approval in *Martin v. United States*, 17 F. 2d 973, 976 (C. C. A. 5).

False testimony, like any other error in the admission of evidence, will be deemed prejudicial unless its harmless character is affirmatively demonstrated. *Vicksburg & Meridian Railroad Co. v. O'Brien*, 119 U. S. 99, 103; *McCandless v. United States*, 298 U. S. 342, 347; *Pettine v. United States*, 201 Fed. 489, 493 (C. C. A. 8); *Dressler v. United States*, 112 F. 2d 972, 978 (C. C. A. 7). Plainly, a defendant is not to be deprived of his constitutional right to a fair trial on the ground that the trial court thinks acquittal not probable on retrial. *Tumey v. Ohio*, 273 U. S. 510, 535.

Applicable here to the Government's attempt to now minimize the effect of Goldstein's testimony is the statement of Mr. Justice Van Devanter in *Miller v. Oklahoma*, 149 Fed. 330, 339 (C. C. A. 8):

"The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempt them to an insistence upon the admission of incompetent evidence * * * When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the

liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

3. **The diligence of the respondents is clear.**—The circuit court of appeals held after extended consideration, that respondents have not been guilty of any delay so unreasonable as to preclude consideration of their evidence on the ground of lack of diligence (AR. 229-230). The Government does not argue the question, contenting itself with the statement (Br. 117): "The record should speak for itself in that connection."⁴⁷

It is therefore submitted that under the properly applicable rule of law enunciated in the *Larrison* case, the facts proved amply justified the new trial ordered by the circuit court of appeals.

4. **The government's contention that the rule of the *Larrison* case has no application is merely an indirect form of contention that the evidence of false swearing was inadequate.**—The Government does not seriously question that the rule of *Larrison v. United States*, 24 F. 2d 82, 87 (C. C. A. 7) is the rule appropriate to test the adequacy of evidence in support of a motion based on evidence of false swearing (Govt. Br. 79-83). It asserts (Point II, Br. 79) that the *Larrison* case rule is properly applied in cases of recantation (Gov't Br. 81). But the Government in the court below recognized that formal recantation, because it is only a sworn statement of a self-confessed perjurer, is the most unreliable of all testimony to prove perjury. *Harrison v. United States*, 7 F. 2d 259; *Dale v. United States*,

⁴⁷ We are also content to submit this issue on the record. See affidavit of Johnson (R. 233 et seq).

66 F.2d 666; *People v. Shiletano*, 218 N. Y. 161. The Government asserts (Br. 82):

"the majority below have extended that [*Larrison*] rule to a case where there has been no recantation, but, on the contrary, vigorous reassertion of the witness's trial testimony."

It then concedes (Br. 65):

"We should have no quarrel with an extension of that [*Larrison*] rule to a case where there has been a clear and convincing showing of perjury found by the trial court."

The Government thus concedes that if Goldstein's testimony was false, the *Larrison* rule applies and the only additional elements required to be shown are diligence and that *without* such evidence the jury *might* have reached a different result.

The Government thus complains, not that the appellate court in invoking the rule of the *Larrison* case, applied an improper rule of law or improper criteria, but that the evidence was insufficient to satisfy one of the propositions required by that rule to be established—the falsity of the witness's testimony, and since the rule authorizes new trial only when all three propositions of fact are established, the rule cannot operate to require grant of new trial in this case. But the Government assumes as a premise that the evidence was insufficient to show falsity and concludes therefrom that the *Larrison* case has no application. The construction under Point II thus amounts to no more than a renewed assertion that the evidence was insufficient to show falsity. As shown above, however, the evidence is more than adequate to reasonably satisfy that Goldstein was guilty of false swearing at the trial within the first requirement of the *Larrison* case. The

Government's conclusion that the *Larrison* case has no application obviously falls with the factual premise upon which it is based.

B. THE MOTION EVIDENCE CLEARLY DEMONSTRATED THE RIGHT OF DEFENDANTS TO A NEW TRIAL BECAUSE IT IS SO MATERIAL THAT IT WOULD PROBABLY PRODUCE A DIFFERENT VERDICT IF THE NEW TRIAL WERE GRANTED.

Ignoring the fact that defendants' evidence is more than adequate reasonably to satisfy that Goldstein swore falsely at the trial and so requires a new trial under the rule of the *Larrison* case, it is submitted that the evidence considered on the essentially different issue of Johnson's guilt or innocence also requires a new trial under the rule of the *Berry* case.

1. *The evidence in support of the motion demonstrates that Johnson never made any expenditures not reconcilable with his reported income.*—Only by charging that Johnson was the sole owner rather than half owner of the Bon Air Country Club and its adjacent properties, the Green House, the White House, Curran Farm and Gas Station, and of the 9730 Western Avenue property and that he was the sole owner of the \$7500 and \$10,000 escrows and the Albany Park Bank Building could the Government argue that its evidence showed Johnson's expenditures to be irreconcilable with his reported income.

The Government (Br. 22-23) makes a flat-misstatement of the trial record in endeavoring to show that defendants' computations on their own evidence admitted that Johnson spent some \$240,000 more than could be reconciled with his tax returns during the period January 1, 1932 through December 31, 1939. The Government states that defendants' expert witness, Sullivan, submitted a computation not taking into account additional expenditures or assets ad-

mitted by Johnson which left a total excess of some \$42,000 citing "3 MR. 992." Reference to Sullivan's testimony appearing on that page shows that he totaled Johnson's expenditures as being some \$432,000 less than the Government's figures. This amount was the result, not of a comparison of Sullivan's and Clifford's computations of the difference between expenditures and income, as asserted by the Government, but of a comparison of their computations of expenditures only. The Government wrongly asserts on the basis of this misstatement of the record that "this figure which did not take into account the additional expenditures or assets admitted by Johnson, left a total excess of some \$42,000. Thus with the additional expenditures or assets admitted by Johnson, there was an excess of some \$240,000 even according to respondents' computations." Defendants' expert witness, Sullivan, testified categorically (3-MR. 994) that including all additional expenditures and assets testified to by Johnson, Johnson's assets and reported income totaled more than his expenditures by \$68,860.84. Defendants' expert therefore cannot by any stretch of the imagination be taken to have computed on the record evidence that Johnson's expenditures exceeded his income and assets by \$42,000, or \$240,000, or any other amount.

It is clear that with the necessary adjustments indicated in the tabulation appearing on page 11, applied to the Government's expenditure chart (Gov't Br. App'x B) there were no expenditures by Johnson in excess of his reported income.⁴⁸

⁴⁸ The Government contends throughout its brief, and the trial court held, that proof of Skidmore's ownership interest in the various properties was not inconsistent with Goldstein's testimony. It should be noted that for the purpose only of showing that Johnson's expenditures should not be computed on the assumption of sole ownership we rely on the motion evidence of Skidmore's ownership only as proving that Johnson was not the sole owner of the properties and that expenditures attributed to him on that basis must therefore be adjusted to accord with the actual extent of his ownership. For this immediate purpose it is not necessary to consider whether or not the evidence also tends to prove Goldstein testified falsely.

The Government does not dispute the convincing nature of the affidavits and documentary evidence directed to showing that Johnson was not the owner of the Albany Park Bank Building or the escrow deposits or of more than a one-half interest in the other properties. It contends that aside from the affidavits showing direct admissions of false swearing and acts or statements inconsistent with Goldstein's testimony at the trial, all the rest of the motion evidence relating to the Bon Air properties "*has a bearing only*" on the question of ultimate ownership of the properties, an issue at the trial. From this it concludes that all such evidence was merely cumulative and under the *Berry* case the motion was therefore properly denied (Br. 107).⁴⁰ The Government also contends under Point IV that under the *Berry* rule the evidence was not such as would probably produce acquittals on a new trial. In support it argues merely that the trial picture as to the credibility of Goldstein's testimony would not be changed by the motion evidence (Br. 111). However, it is obvious that the newly discovered evidence of half ownership of Skidmore in the first group of properties and the evidence of statements and acts of Goldstein inconsistent with his testimony at the trial as to Johnson's supplying him currency for the two escrow deposits and the Albany Park Bank Building and as to delivery of a deed for the latter is so overwhelming that the testimony of Goldstein that the purchase money was given to him by Johnson would pale into insignificance on the ultimate question whether all the purchase moneys for the first group of properties and all the expenditures on Bon Air, and all of the escrow

⁴⁰ The Government plainly shares the error of the trial court in its narrow and erroneous view that the evidence as to acts of ownership "*has a bearing only*" on the question of ultimate ownership of the properties and in its failure to appreciate that the evidence as to ownership of the properties was, as pointed out above, pp. 15-17, 18, also highly pertinent to show motive of Goldstein and corroboration of the contradictory affidavits of Johnson all on the issue of false swearing.

deposits and purchase money for the Albany Park Bank Building were money chargeable as personal expenditures to Johnson. —

2. The Government's charge that Johnson was the owner of the gambling houses operated by the co-defendants has been abandoned and the government now admits the co-defendants, not Johnson, were the owners of such houses.—In the opinion of this court, reversing the decision of the circuit court of appeals (*United States v. Johnson*, 319 U. S. 503), critical importance is attached to the question whether Johnson owned the gambling houses operated by the co-defendants. This court there said (p. 516):

"During the course of his extensive testimony, Johnson himself put simply and completely the only real problem before the jury when he swore that he 'never had any financial interest in any gambling club operated by any of the defendants.'"

"The jury decided this central issue against Johnson * * *. The testimony also amply justified the conclusion that Johnson owned a proprietary interest in this network of gambling houses * * *."

While the case was pending on the merits in this court, the government apparently concluded that the "central issue" as to the ownership of the gambling houses from which Johnson's unreported income was supposed to have originated must be resolved in favor of Johnson for it openly and publicly admitted by inconsistent pleadings in other criminal proceedings that persons other than Johnson were the owners of the identical gambling enterprises in which he had been by it urged to have a proprietary interest and had themselves received the income from these houses with which Johnson was charged in this case. On March 19, 1940, the defendants Sommers, in Indictment

No. 32154, Hartigan in Indictment No. 32155, and Kelly in Indictment No. 32156; had been indicted in the United States District Court for the Northern District of Illinois, Eastern Division, for attempting to defeat and evade income taxes. Hartigan was accused on two counts. The first count charged that in 1937 he derived income from gambling in the amount of \$119,824.30 and reported income in the amount of only \$13,628.00. The second count charged that in 1938 he derived income from business in the amount of \$101,456.08 and reported as income from business only \$11,500.00 and from dividends \$20.00. The indictment against Kelly in the first count charged that in 1936 he failed to report income from gambling in the amount of \$81,847.36. The second count charged that in the year 1937 he failed to report income from gambling in the amount of \$212,645.45. The third count charged that in the year 1938 he failed to report income from gambling amounting to \$99,335.51. The indictment against Sommers was in three counts. The first charged that during the calendar year 1936 he derived income from gambling in the amount of \$433,615.02 and reported his income, as a "speculator" as only \$11,000.00. In the second count he was charged with having failed to report income for 1937 from gambling business in the amount of \$428,951.51. The third count charged that in the year 1938 he derived income as a speculator in the amount of \$8,200.00 and from gambling in the amount of \$530,125.25, a total of \$538,325.25, of which he reported only \$9,218.29. Stuart Solomon Brown was accused as an aidor and abettor at each count in each indictment.

In this Court the Government charged that for 1936 Johnson's income amounted to \$485,294.57 (Br. on Rearg., Nos. 4 and 5, 1942 Term, p. 52). This was based upon the testimony of Frank J. Clifford at the trial that the total

sum of \$533,216.94 was chargeable to Johnson.⁵⁰ He said (3 MR. 751):

"In making the calculation I assumed that Mr. Johnson owned all of the gambling houses that have been named in this testimony and that all the checks cashed by any of these defendants were checks representing income of Mr. Johnson and that all the currency exchanged by any defendants represented income of Mr. Johnson."

For 1937 the United States charged Johnson with total income from gambling houses of \$852,890.56 (Gov't Br. on Rearg., p. 52). With an adjustment of \$203,954.03 on account of checks cashed by Creighton, this figure is derived from a total amount of \$1,056,844.59 charged to Johnson by Special Agent Clifford who testified (3 MR. 752) that in making this calculation "all of the cash exchanged by any of these defendants was income of Mr. Johnson and all of the hundred dollar bills that were delivered out of a bank down to the Lawndale Currency Exchange, I counted that as Mr. Johnson's."

For 1938 the United States charged Johnson with the total income of gambling houses in the amount of \$850,994.20 (Gov't Br. on Rearg., Nos. 4 and 5, 1942 Term, p. 53). This was derived from a figure of \$939,807.12 computed by Agent Clifford (3 MR. 753) and takes into account an adjustment to eliminate amounts identified with the acquitted defendant Creighton (Gov't Br. on Rearg., Nos. 4 and 5, 1942 Term, p. 52, note 11). Clifford testified (3 MR. 753) that for this year his computation was based on the assumption that "anything that belonged to the gamblers belonged to William R. Johnson and that is included in

⁵⁰ The \$533,216.94 figure was by the Government on the argument in this Court adjusted to eliminate the amount of checks cashed by the acquitted defendant Creighton so as to arrive at the figure of \$485,294.57.

my computation. That is all for 1938. That makes a grand total of \$939,807.12."

For 1939 the Government charged Johnson with \$926,499.30, eliminating \$40,000 from the Clifford figure (3 MR. 754) on account of the checks cashed by Creighton. He testified that this included \$886,499.30 of the balance of the "gamblers' checks that went through the Lawrence Avenue" Exchange.

Bills of particulars in indictments against co-defendants.—In December 1942, while this case was pending on the merits after reargument and before decision, in this Court, the United States filed bills of particulars in amplification of these indictments in which it was stated specifically that the source of the income of defendant Kelly during the calendar years 1936, 1937 and 1938 was the D. & D. Club and of the defendant Sommers during the calendar years 1936, 1937, and 1938, was the Horse-Shoe Club and the Dev-Lin, and of the defendant Hartigan during the calendar years 1937 and 1938, was the Harlem Stables and the Lincoln Tavern. The Government, in this court, in its brief on reargument, had specifically named these same gambling houses and contended that the evidence showed Johnson to be the single owner of the same gambling houses (Govt. Br. on reargument Nos. 4 and 5 O. T. 1942, pp. 18-30). At no time in the proceedings has there been denial of the allegation contained in the appendix to defendant's motion for new trial, and incorporated therein by reference (R. 13, 65-66), that the United States attorney in bills of particular in the cases against the co-defendants specified that they and not Johnson received and were liable for taxes upon the same income which, in the Johnson case, the Government contended Johnson had received.

Submission of this additional evidence to any jury would obviously have a great, if not decisive, tendency to con-

vince that Johnson did not and could not have received from the gambling houses of the co-defendants, any income whatsoever. The filing of indictments against two or more persons, charging the same violations of law, may not ordinarily be deemed prejudicially contradictory. The situation here presented is radically different. Throughout the trial in the district court, the appeal in the circuit court of appeals, the argument and briefing in this court on the original argument and on the re-argument, the government in this case contended, over a period of almost three years that Johnson had been shown to be the single owner of these gambling enterprises. Nevertheless, and while the case was pending in this court, the district attorney, with the full knowledge developed by the trial and notwithstanding the contention pressed upon this court, filed a bill of particulars asserting that the co-defendants were the owners. A position thus adopted after full knowledge of the facts developed by an obviously carefully prepared case, cannot be ignored as a mere precautionary measure. Such allegations must be treated as an admission by the United States that Johnson was not the owner of the gambling houses.

3. Johnson's testimony at the trial as to his personal expenditures is proved to be true by the evidence submitted on the motion which thus constitutes important corroboration and support for all of his testimony which, if believed, would require a verdict of acquittal.—The evidence brought forward on the motion clearly establishes that Skidmore was a half-owner with Johnson of the Bon Air and Associated Properties, 9730 Western Avenue and The Dells; and that Johnson had no interest in the Albany Park Bank Building or in the \$10,000 and \$7,500 escrow deposits (see *supra*, pp. 34-76 and Appendix). Plainly this evidence furnishes important corroboration for his testimony at the trial

that he had only a half-interest in the first group of properties and no interest in the Albany Park Bank Building or the escrow deposits (3 MR. 955, 957). By the same token, the corroboration afforded by this confirming evidence extends to all of his testimony. If believed, his testimony would require a verdict of acquittal since it demonstrates not only that his expenditures were less than his assets at the commencement of the accounting period plus his reported income, as is shown in the table contained in footnote 10 *supra*, page 11, but as well included a specific denial of ownership of the gambling houses (3 MR. 949-950).

III.

THE TRIAL COURT'S DENIAL OF THE AMENDED MOTION FOR NEW TRIAL CONSTITUTED AN ABUSE OF DISCRETION.

The trial court erroneously failed and refused to apply the doctrine of the *Larrison* case to the evidence and in purporting to apply the doctrine of the *Berry* case committed reversible error.

A. THE TRIAL COURT MISCONCEIVED THE PURPOSE AND EFFECT OF THE MOTION TESTIMONY ON THE ISSUE OF GOLDSTEIN'S FALSITY AND POSED IMPROPER AND IN- APPLICABLE CRITERIA AS THE TEST FOR FALSITY.

The trial court disregarded completely the theory of defendants' proof that Goldstein testified falsely at the trial. He gave no consideration whatsoever to proof that Goldstein is an unreliable witness. He gave no consideration to evidence corroborating Johnson, thus strengthening Johnson's categorical charge that Goldstein had testified falsely. He completely ignored proof that Goldstein had compelling motive for giving false testimony. His opinion indicates basic misconception of defendant's pur-

pose in tendering the motion evidence and an insistence upon inapplicable criteria as the only method of proof that Goldstein testified falsely.

1. The trial court took the position that proof of Skidmore's acquisition of the various properties and of his ownership in them could only be relevant on the issue of falsity if Goldstein had testified in so many words that Johnson was the sole owner of such properties.—The trial court (R. 463-464) wrongly conceived defendants' argument as boiling down to the following syllogism:

Goldstein testified that Johnson was the "sole owner" of all of the properties involved.

but

The evidence in support of the motion demonstrates that Johnson was not the sole owner of these properties.

therefore

Goldstein's testimony is proven false.

This assumption by the court and by the United States (Br. 84) is without foundation. The defendants have never suggested that Goldstein testified in so many words that Johnson was the sole owner of all the properties involved. Defendants have contended and the Government admits that the inference from Goldstein's testimony was that Johnson did have 100% ownership in these properties (Br. 115). Defendants necessarily, in order to prove that Goldstein's testimony was material and to show that "without it the jury *might* have reached a different result" discussed the meaning as well as the actual words used by Goldstein. As has been pointed out above, proof that Skidmore had substantial ownership interest in these properties established a motive for Goldstein's false testimony of such powerful character that the Government concedes he once

before committed perjury to effectuate it. It was obvious error for the trial court to ignore the relevancy of this evidence on this point and to consider it as being offered on the mistaken assumption by the defendants that Goldstein had used the words "Johnson was the sole owner" in his testimony.

2. The District Court's criteria for the proof of falsity of Goldstein's testimony are improper.—The trial court implies that such proof should have been made either by a formal affidavit of recantation by Goldstein or by affidavits from persons having personal knowledge stating that Johnson did not give Goldstein the money to buy the properties. The first method is the *worst*, and the second in the circumstances of this case an *impossible* method of proof of false testimony.

The trial court's emphasis on the fact that Goldstein had not formally recanted indicates a disregard of the decisions of the court below and other courts which have held time and time again that a formal affidavit of recantation by a self-confessed perjurer is the most unreliable of all methods of proving the falsity of his testimony for the purpose of a new trial. *Dale v. United States*, 66 F. 2d 666; *Harrison v. United States*, 7 F. 2d 259; *People v. Shiletano*, 218 N. Y. 161; *Powell v. Commonwealth*, 133 Va. 741. This erroneous action parallels his rejection of admissions by Goldstein that he testified falsely (R. 100, 126, 221, 233), made under circumstances which preclude any possibility of collusion for the purpose of obtaining a new trial, as "merely impeaching."

The court's reiteration, in connection with the discussion of each item of property concerning which Goldstein testified falsely, that defendants have submitted no affidavit of

a third party in which it is stated that "Johnson did not give Goldstein the money" (R. 476, 483, 485, 490, 491, 492), to purchase said piece of property shows either a complete lack of understanding of the facts of the case or an insistence upon an inherent impossibility as a prerequisite to the granting of relief to defendants. On Goldstein's own testimony it is apparent that only Johnson and himself could testify of their own knowledge as to whether Johnson had given him the money to purchase the various pieces of property. Johnson denied it. Whether Goldstein's testimony is assumed to be true or is assumed to be false, no one else could have had personal knowledge concerning the matter.

The trial court disregarded the fact that a conviction for the crime of giving false testimony may be had on circumstantial evidence showing merely the improbability of the testimony claimed to be false (*Schonfeld v. United States*, 277 Fed. 934) and that the testimony of one witness which is corroborated is sufficient to obtain a conviction for perjury (*Weiler v. United States*, 323 U. S. 606; *United States v. Palese*, 133 F. 2d 600 (C. C. A. 3); *Holy v. United States*, 278 Fed. 521 (C. C. A. 7)). The testimony in support of the motion for new trial is clearly sufficient as a matter of law to demonstrate the falsity of Goldstein's testimony. As the circuit court of appeals pointed out in the *Larrison* case, proof for the purpose of a motion for new trial need only be sufficient to "reasonably satisfy" the court of the falsity of the testimony of a material witness. Obviously, none of the procedural or evidentiary safeguards upon which Goldstein might insist if he were on trial charged with the crime of perjury, are available for use by the Government against the defendants facing imprisonment because of Goldstein's false testimony. On the contrary, it is the

defendants, facing imprisonment, who are entitled to the benefit of any doubt—not the Government or Goldstein *who is not on trial*. This Court is not called upon nor was the court below, nor was the trial court called upon to impose criminal sanctions on Goldstein for his false testimony.

B. THE TRIAL COURT ERRONEOUSLY REJECTED THE EVIDENCE AS CUMULATIVE AND ERRONEOUSLY IGNORED ADMISSIONS BY THE GOVERNMENT THAT JOHNSON IS NOT THE OWNER OF THE GAMBLING HOUSES.

The trial court, defining evidence tending to prove an issue concerning which testimony was adduced at the trial as cumulative evidence, and erroneously confusing the distinction between evidence which, under this definition, may be "cumulative" and evidence which is "merely" cumulative rejected important relevant and admissible evidence of the defendants proffered on the motion for new trial. The trial court also completely ignored admissions by the Government that the mainstay of their case against defendants, namely, the proposition that Johnson was the real owner and had received all of the income from the gambling houses operated by the co-defendants, has since the trial been formally abandoned and repudiated by the Government.

1. The trial court erroneously assumed that evidence which tends to prove an issue on which testimony was given at the trial must be rejected on a motion for new trial as cumulative, neglecting the established rule that such evidence may only be held insufficient if it is "merely" cumulative.—The holding of the trial court that the motion was properly to be denied under the *Berry* case doctrine, insofar as that contention is based on the ground that the

motion evidence is merely cumulative or merely impeaching, arises from a basic misconception as to the meaning of the *Berry* case rule. The Government contends that "cumulative evidence is not ground for a new trial" (Br. 108). The error lies in assuming that the statement in the *Berry* case rule that the evidence must not be "merely cumulative" and not "merely impeaching" as a matter of law makes inadequate to justify a new trial any evidence, regardless of its quality or quantity, of which it can be said that it is also cumulative or also impeaching.

The true rule of the *Berry* case, of course, is that admissible evidence diligently discovered which would probably cause a different result on new trial and is consequently more than merely cumulative or merely impeaching (although it may, incidentally, be cumulative or incidentally impeaching) requires the granting of a new trial. It seems clear that the provisions of the third and sixth precepts of the *Berry* case rule that the evidence be not "cumulative only" or "only * * * to impeach" merely exemplify and emphasize the distinguishing requirement in the fourth precept of the same rule that the evidence be so material that it would "probably produce a different verdict, if the new trial were granted." The third and sixth elements are merely statements in negative form of necessary corollaries of requirement 4. Plainly they do not mean that evidence, no matter how material and no matter how strongly it impels to the belief that it would cause a different result on a new trial, is nevertheless insufficient if it also happens to be cumulative or impeaching in character. Indeed the Government concedes that impeaching evidence may constitute a ground for new trial (Br. 110-111). The fallaciousness of the *Berry* case rule as invoked by the trial court and relied upon by the Government, whether invoked to bar new trial

because the new evidence is impeaching or because it is cumulative, is equally apparent. The mere fact that the alleged newly discovered evidence tends to prove the same facts as did testimony which was admitted at the trial does not require a conclusion that because cumulative it is insufficient to constitute ground for a new trial. On this point the court below cited with approval *People v. Royals*, 356 Ill. 626, 639:

"The rule * * * does not bar the granting of a new trial on the ground of newly discovered evidence if the new evidence relates to a material point contested on the trial, otherwise there would scarcely ever be a new trial granted on such ground."

See also *People v. Cattell*, 289 Ill. 207.

As pointed out in Bowers "Judicial Discretion of Trial Courts," (1931) Section 549:

"The orthodox and technical statement of the rule was that cumulative newly found evidence is not sufficient to justify the award of a new trial. But this rule, as thus stated, was more honored in the breach than in the observance, and a qualifying adjective has been added which has an important bearing upon the power of a trial court in considering the motion when based on this ground. Under the rule as just stated, there is not a modicum of discretion resident in the trial court in passing upon this phase of the application. All that is required is a determination of whether or not the new evidence is cumulative. This is easily ascertained by a comparison with the other evidence given at the trial, and there is no choice of decision. But under the rule now generally accepted, the adjective 'merely' has been pre-fixed to the term cumulative, and an entirely different meaning conveyed. So, it is now said that a new trial will not be granted if the newly-discovered evidence is merely cumulative. [Citing cases.]

The qualification is material because the courts found that in a large percentage of such cases the new evidence, though in fact cumulative, might have a decisive effect if presented to a jury, and might reasonably produce a different result from that reached at the first trial, so that it would be an injustice not to give the party an opportunity to present it. Accordingly, revising the above statement of the present rule, and adding the necessary implication, the precedents hold that the newly-found evidence, even though cumulative, will warrant a new trial if it reasonably appears therefrom that its introduction would probably change the result of the trial.

"Section 550: The rule regarding the consideration of after-discovered evidence of an impeaching character, when it is offered as a basis of a motion for a new trial, presents the same features as that relating to cumulative evidence just discussed. Whatever apparent inconsistencies, conflicts, or tendencies the decisions may present, or whatever ineptitude of expression may occur in the reports, the ultimate and essential conclusion deduced from modern precedents is that if the evidence is merely impeaching or contradictory and nothing more, it is not ordinarily sufficient to warrant the granting of a new trial. But here again the rule is subject to an apparent exception as important as the rule itself. *The character of the new evidence may appear to be of sufficient strength and probative force to render probable a different result upon a re-trial, and the fact that it impeaches or contradicts a witness who testified at the first trial is merely incidental and becomes subordinate to this controlling feature.* This is not in reality an exception to the general rule as above stated. It is an extension of it and entirely in harmony with it. Hence, it may be expressed as the policy of the courts to grant new trials when the newly-found evidence seems strong enough to make it probable that the verdict on re-trial would be different from the one first returned." (Emphasis supplied.)

Reason and precedent both clearly show that after discovered evidence which would probably produce a different result on a new trial requires the grant of a new trial even though some or all of it may also be cumulative or impeaching.

2. The trial court erroneously ignored admission by the Government that its trial contention that Johnson was the owner of the gambling houses operated by the co-defendants is untrue.—We have demonstrated under Point II B 2 *supra*, p. 91, that the Government has repudiated and abandoned its claim that Johnson was in fact the owner of the gambling houses operated by the co-defendants and received all of the income from such houses. At the same place we demonstrated the importance of this post-trial admission by the Government. It is sufficient here to point out that nowhere in the trial court's opinion on the motion for new trial or in his opinion on the amended motion for new trial does he make so much as footnote reference to this crucial admission of the Government.

C. THE TRIAL COURT IGNORED THE FACT THAT ALL OF THE EVIDENCE ON THE MOTION FOR NEW TRIAL AND THE AMENDED MOTION FOR NEW TRIAL HAD BEEN INITIALLY CONSIDERED BY THE CIRCUIT COURT OF APPEALS AND THAT THE FIRST REMAND AND THE SECOND REMAND WERE MADE AFTER FULL CONSIDERATION AND OVER VIGOROUS OPPOSITION BY THE GOVERNMENT.

It is respectfully submitted that the circuit court of appeal in considering and disposing of a motion for remand under Rule II (3) of the criminal appeals rules promulgated by this court is required to determine whether or not the evidence submitted in support of the motion for remand would justify the trial court in granting a motion for new

trial.⁵¹ The trial court on the motion for new trial treated the action of the court of appeals in remanding (as he treated the action of the court of appeals in reopening the proceedings and remanding for the filing of an amended motion for a new trial) as mere "ceremonial gestures" to be given no meaning or effect in considering the motion for new trial and the amended motion for new trial. This was clearly error (semble *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238).

This error alone demonstrates such a clear abuse of discretion as to require reversal of the trial court.

⁵¹ Such motions for remand, both under explicit authority of the rules and prior to the adoption of the rules, have uniformly been held to require a showing that the after-discovered evidence would justify the granting of the proposed motion for new trial. (*Angle v. United States*, 162 Fed. 264 (C. C. A. 4, 1908), *Martin v. United States*, 17 F. 2d 973 (C. C. A. 5, 1927), *Larrison v. United States*, 24 F. 2d 82 (C. C. A. 7, 1928), *Silva v. United States*, 38 F. 2d 465 (C. C. A. 9, 1939), *Perry v. United States*, 39 F. 2d 52 (C. C. A. 5, 1930), *Davis v. United States*, 47 F. 2d 1071 (C. C. A. 5, 1931), *Dowling v. United States*, 49 F. 2d 1014 (C. C. A. 5, 1931), *Horne v. United States*, 51 F. 2d 66, (C. C. A. 4, 1931), *Fause v. United States*, 54 F. 2d 517 (C. C. A. 2, 1931), *Dale v. United States*, 66 F. 2d 660, (C. C. A. 7, 1933), *LaBelle v. United States*, 86 F. 2d 911 (C. C. A. 5, 1936), *Hawkins v. United States*, 90 F. 2d 551 (C. C. A. 5, 1937), *Lee v. United States*, 91 F. 2d 326 (C. C. A. 5, 1937), *Isgrig v. United States*, 109 F. 2d 131 (C. C. A. 4, 1940), *Wagner v. United States*, 118 F. 2d 801, (C. C. A. 9, 1941), *Evans v. United States*, 122 F. 2d 461, 383 (C. C. A. 10, 1941), *Hines v. United States*, 131 F. 2d 971, (C. C. A. 10, 1942), *Hamel v. United States*, 135 F. 2d 969 (C. C. A. 6, 1943); *Levinson v. United States*, 32 F. 2d 449 (C. C. A. 6, 1929); *Markland v. Checker Cab Co.*, 142 F. 2d 95 (C. A. D. C., 1944).

In *Hamel v. United States*, 135 F. 2d 969 (C. C. A. 6, 1943) the court, pending appeal from conviction under a section of the Immigration Act similar to the White Slave Act, remanded to permit motion for a new trial or modification of sentence. Because the remand was for alternative action by the trial court, the District Court's order denying motion for new trial and modifying the sentence was not deemed a disregard of the appellate court's determination on the petition for remand and was, therefore, affirmed. *Hamel v. United States*, 138 F. 2d 508 (C. C. A. 6, 1943). In *Long v. United States*, 139 F. 2d 652 (C. C. A. 10, 1943) the evidence presented on motion for remand does not appear. Furthermore, apparently the witnesses actually testified in support of the motion in the trial court. In *Goodman v. United States*, 97 F. 2d 197 (C. C. A. 3, 1938), the ground for motion for new trial was after-discovered evidence affecting credibility of Government witnesses. Remand was agreed to by the Government and testimony of the witnesses relied upon by the defendant and by the Government, not produced before the Circuit Court of Appeals, was heard in the trial court.

IV.

THE CIRCUIT COURT OF APPEALS APPLIED NO IMPROPER STANDARDS IN REVIEWING AND THE RECORD REQUIRED REVERSAL OF, THE ORDER DENYING MOTION FOR NEW TRIAL.

In affirming a judgment reversing a trial court for abuse of discretion, this Court has ruled: "The informed judgment of the circuit court of appeals upon a view of all relevant circumstances is entitled to great weight. And, except for strong reasons, this Court will not interfere with its action." *Meccano, Ltd. v. John Wanamaker*, 253 U. S. 136, 141.

There is plainly no merit in the Government's assertion that the decision of the court below merely expressed its own views as to the weight of the motion evidence. On the contrary, it is clear that it found the trial court guilty of so many conclusions from the evidence without support in reason or in law as to make plain the failure to exercise judicial discretion and the necessity for considered review of the evidence which the appellate court found showed unerringly that Goldstein's testimony was false in material particulars.

The Government in its first point (Gov't Br. 67) contends that the court erred in holding that the decision of the trial court was an abuse of discretion because this conclusion was based merely on its factual conclusion that Goldstein testified falsely at the respondents' trial (Gov't Br. 70, 72).

The Government's argument is invalid. The appellate court's finding of abuse of discretion was based, not on a mere review of the evidence *de novo* as the Government

contends, but on the amply justified conclusion as a matter of law that the trial court's decision was unreasonable and based upon errors of law.

The government's arguments appear to be based chiefly on a contention that the trial court failed to use in *haec verba* the words "unreasonable, arbitrary or capricious" (Br. 73-76). It is hardly credible that the government seriously advances such reliance on those words as constituting a ritualistic phrase indispensable to a valid finding of abuse of discretion. However, if use of such language is a *sine qua non*, a careful reading of the opinion of the circuit court of appeals, demonstrates that it is amply satisfied. On the other hand, if the question of whether the appellate court properly held the trial court to have abused its discretion is to be tested by reference to the evidence, it is plain that the examples cited by the government (Br. 73-74, note 29), fall far short of supporting its assertion that the appellate court merely reviewed the case *de novo* (Br. 73).

It is submitted that the most casual consideration of the majority opinion here sought to be reviewed, discloses a keen sense of the limitation on the court's power to reverse for abuse of discretion.

The opinion of the court below is profuse with language indicating that the appellate court was directing its attention to the question whether the trial court's conclusions were "unreasonable, against logic or without justification in the fact or inferences to be drawn from them" (Cf. Gov't Br. 75). Dealing with the district court's refusal to accept the Green affidavits and acceptance of Goldstein's contradiction the court said (AR. 213): "No reason appears on the face of the record as to why he [Goldstein] should be

believed in preference to Green."⁵² The Court also corrected the district court's holding that the Green affidavit is "unreasonable and unworthy of belief" by showing corroborative undisputed facts with which it is consistent (R. 223-224).

Dealing with the Hess affidavits corroborated by those of Johnson and his brother⁵³ and their conflict with the denial of Goldstein the appellate court said of Judge Barnes (AR. 213):

"After pointing out that Hess was at one time counsel for some of the co-defendants in the case, the court places a strained construction upon his testimony by stating that it 'could as well' be taken to mean that he (Goldstein) was sorry he had testified at all, as it could be taken to mean that he was sorry he had lied.' We do not think the testimony of Hess is capable of such construction. * * *Any kind of logic or reason of which we are aware* requires the acceptance of Hess' version as true and that of Goldstein as false." (Emphasis supplied.)⁵⁴

The court next dealt with the affidavit of Leo Blockus (R. 198) in which he stated that on both July 27, 1943,

⁵² The Government says that the improbability that Skidmore and Goldstein would seek a disbarred lawyer "regarding the partition suit" or admit that his testimony was false, furnishes good reason for believing Goldstein. This overlooks that the advice sought was as to how Skidmore could defend the partition suit and yet conceal his interest (and so continue to evade tax on the income which it represented) (R. 101), advice which might well subject the lawyer who gave it to criminal charges and disbarment. And the Government also overlooks that Goldstein's complete denial of the meeting to which Green refers in his third affidavit (R. 216) is offset by the corroboration of Green afforded by the affidavit of Engelbretson (R. 232-233).

⁵³ There is a significant discrepancy between the trial court's emphasis on John E. Johnson's fraternal interest in discounting his affidavit (R. 479) and his failure so to consider the filial interest, at least as great, in appraising the affidavit of Theodore Goldstein. (AR. 152-154, 165).

⁵⁴ The Government states the majority was "under a misapprehension as to what 'Hess' version' was" (Br. 73, note 29). The cross-reference is to Gov't Br. 35-36 and the Government apparently relies on a "crucial" passage from a memorandum (Br. 36) prepared by Special Agent Read and signed by Hess (R. 245-247). All this shows is that Hess had already stated his best recollection of what was said and, as a lawyer, declined to offer what would obviously be objectionable as mere opinion testimony. This does not show that Hess' "version" was other than as stated by the circuit court of appeals. See pp. 68-69. *supra*.

and on July 28, 1943, Goldstein stated to him that the Albany Park Bank Building was his building and his property. The district court had held that denial of these statements was made by Goldstein, Levine, and Sampson (R. 493). The circuit court of appeals pointed out (AR. 214) that Levine had made a subsequent affidavit (R. 228) disclosing that Goldstein was already talking to Blockus at the latter's office when he, Levine, arrived, and Sampson came even later than he, and therefore they could not know what was said before their respective arrivals. The appellate court also called attention to the fact that the Levine and Sampson affidavits dealt only with the conference on July 28 and the Blockus affidavit as to statements of Goldstein on July 27 were denied by nobody but Goldstein. The opinion of the circuit court of appeals thus points out that the opinion of the trial court overlooks the important second affidavit of Levine and arbitrarily excludes from consideration the part of Blockus' affidavit concerning the statement of Goldstein made on July 27. The appellate court then points out the important corroborating circumstance that Goldstein's presence at the office of Blockus in the County Treasurer's office attempting to settle the claim for taxes against the Albany Park Bank Building is scarcely consistent with Goldstein's contention that Johnson owned the property. It might also be pointed out that Blockus' statement that Goldstein offered to pay the sum of \$150 per month and later \$250 per month to apply on the delinquent taxes (R. 198-199) for 1940-1943 (AR. 102) is not denied by Goldstein (R. 263-264) and such an offer in July 1943 is completely inconsistent with Goldstein's affidavit that all money of Johnson is being held by him subject to a United States government lien, of which notice was given him in the early part of 1940 (R. 252, 261). The circuit court of appeals concluded (AR. 214):

"Blockus certainly could have had no motive in making a false affidavit as to what Goldstein stated, and we see no basis for a finding other than that his testimony was true and that of Goldstein false." (Emphasis supplied)⁵⁵.

Dealing with the income tax returns the court used the unequivocal language (R. 219):

"We think the 'circumstances' destroy themselves, but more than that, the court, in accepting them as destroying the evidentiary value of the returns, has overlooked the essential point in the matter."⁵⁶

The court's strong feeling with respect to the utter lack of logic in the trial court's treatment of the evidence is betrayed in its comment on the trial court's rationalization of Goldstein's leasing of the Albany Park Bank Building property. It said (AR. 220):

"We suppose, according to this reasoning, if Goldstein should lease this property from now until eter-

⁵⁵ The Government cites (Br. 74, note) as a "basis for a contrary finding" its own Brief, pp. 51-52. The cited portion of the brief, aside from relying on the affidavits of Levine and Sampson, both rendered meaningless, as shown above, by the later affidavit of Levine and the fact that they did not purport to have been present at the conference of July 27, relies on the fact that Goldstein told Blockus the Government had a lien on the property without stating the name of the licensee (R. 253, 199). Argument that this was the equivalent of saying the property was Johnson's (Gov't Br. 51), is manifestly absurd.

The inference is equally open that this meant the property was Skidmore's. Lien against all of Skidmore's assets was effective at least as early as March 31, 1941 (see statement in letter of counsel, (R. 62-63) incorporated in the motion by reference (R. 13) and undenied by the government (R. 280 et seq)). In this connection it is important to note that a government tax lien is effective generally against all as of the date of demand of the taxpayer, but only as of the date of record as against mortgagees, pledgees, purchasers and judgment creditors, and as to mortgagees, pledgees and purchasers of securities only after actual notice. (I. R. C., secs. 3670-3672. 9 Mertens, Law of Federal Income Taxation, Secs. 54.38-54.42, 54.48, 54.50-54.51).

⁵⁶ The Government, while it refers to this criticism of the "circumstances" argument (Br. 74, note) fails to explain in what respect the appellate court ignored the evidence reached conclusions contrary to the facts established by the record, or in what way this shows review *de novo*. No suggestion is made by the Government at any time that the returns were made by the Goldsteins as the result of fraud, duress or mistake. The continued reference to "circumstances" without the elucidation of any rule of reason or of law applicable to bar consideration of the returns is inadequate to justify the trial court's holding (AR. 165) that the returns are not evidence of false swearing.

nity and retain the rents as long as he lives, it would not be inconsistent with his testimony that he purchased this property for and conveyed the title to Johnson. Further, it would not be inconsistent with the Government's theory that Johnson was the owner. *We do not agree with such reasoning.*" (Emphasis supplied.)⁵⁷

Considering all the evidence with respect to the Albany Park Bank Building the court concluded: "We have a strong and abiding conviction that Goldstein's testimony concerning Albany Park Bank Building was false." (AR. 221.)⁵⁸

The trial court first ignored (R. 490) and then dismissed as merely cumulative (R. 499, 501) the unequivocal statements in the affidavits of Holleran and Guild (R. 128, 138) that Goldstein had claimed to both of them that \$10,000 de-

⁵⁷ The Government suggests (Br. 74, note) that the simple explanation is that the trial evidence showed Goldstein had been acting as agent for the building.

Goldstein's admission (R. 253) that he did not notify Johnson of the receipt of rent income from the Albany Park Bank Building on which income Johnson would have been required to pay an income tax if it was his, establishes that the agency was not for Johnson. To the same effect is the fact of his mailing monthly reports of income and disbursements on the Albany Park Bank Building to Skidmore (R. 165), unconvincingly denied (R. 254) by Goldstein (see *supra*, p. 56). Over a year after the trial and after Johnson had branded him publicly as a perjurer, Goldstein executed a five-year lease of the building and transferred to the lessee all of the stock in the Albany Park Safe Deposit Vault Company (R. 202, 205) and again in 1944 executed a lease for an additional ten years (AR. 76, 79). Goldstein admits he never made a single report to Johnson concerning the property—its maintenance, upkeep, management, or rental (R. 253). Instead he made such reports to Skidmore (R. 165-166). Admittedly he has never accounted to Johnson for a penny of the rents collected by him under the present lease or from any previous occupancy. Goldstein's offer to the County Treasurer to compromise the tax claim by payment out of the rents was never communicated to Johnson (R. 199), nor was the fact that Goldstein contracted to pay premiums of over \$300 on the property for insurance demanded by the County Treasurer (R. 206, 207). Both the offer and payment were inconsistent with agency for Johnson, since under Goldstein's own affidavit all moneys held by him as agent for Johnson was subject to lien (R. 252).

⁵⁸ The Government apparently cites the statement of the circuit court of appeals (Br. 74, note) to show that that court merely reviewed the evidence and reached its own conclusion. This argument overlooks that the quoted language of the court's opinion is a conclusion based on the statement in the third preceding sentence: "In addition, the income tax returns and the long-term leasing by Goldstein are utterly inconsistent with his trial testimony." Plainly the circuit court of appeals was testing the trial court's decision by a single standard—whether it could be reconciled with reason.

posited in escrow by Goldstein was Goldstein's money, a statement in direct conflict with Goldstein's trial testimony that the currency for the deposit was received from Johnson "at whose request the deposit was made" (2 MR. 61). The circuit court of appeals pointed out (AR. 221) that Goldstein did not deny these statements although saying he did not recall them (R. 251-252).

The court found (AR. 223) that the Fowler affidavit as to inconsistent statements by Goldstein to the effect that he had bought the Bon Air Country Club for Skidmore could not rightly be rejected merely on the ground that he was a discharged employee. The appellate court accepted the Fowler affidavit because there is nothing in the record impugning Fowler's reputation and he is not shown to have any connection with any of the parties or any motive for false swearing.

Speaking of the Marsh and Peacock affidavits which the trial court held merely cumulative (R. 504) the circuit court of appeals held that they furnished convincing proof of the truth of Johnson's testimony that he was the owner of only one-half interest in Bon Air and furnished strong circumstantial proof of the falsity of Goldstein's testimony that he bought the property for Johnson and demolished the implication which was drawn therefrom and used by the Government to such good advantage (AR. 225). The court also points out that the trial court overlooked the relevance of the same affidavits to show motive on the part of Goldstein by disclosing his plan to keep secret the one-half ownership of Skidmore in the property.⁵⁹

⁵⁹ The Government's objection (Br. 74, note) that the Marsh and Peacock affidavits were cumulative on the issue of ownership of Bon Air also overlooks that they were pertinent on the issue of motive and practice of Goldstein to conceal Skidmore's property interests and therefore not cumulative as to the issue of falsity of Goldstein's testimony, the new and distinct issue presented by the motion for new trial.

Dealing with the affidavits of Goldstein the court again uses the language of law rather than fact appreciation when it says of such affidavits (AR. 225): "The proof therein contained affords *no substantial support* for a finding that he testified truthfully at the trial." The court stated that the conviction it entertained with respect to Goldstein's testimony was "without reservation."⁶⁰

The court alluded to the fact that on review of the first motion for new trial it had held that it could not say that the newly discovered evidence "*inevitably leads to the conclusion that Goldstein had testified falsely.*" (Emphasis supplied.) It there recognized the degree of certainty required to be entertained by the appellate court with respect to the conclusions to be drawn from the evidence before reversal for abuse of discretion could properly be had. Continuing to recognize this application of the rule to evaluation of facts the court said in its second opinion (AR. 227):

"It is not necessary, however, that we retract our previous holding regarding the 'abuse of discretion' rule."

"It is our conclusion that the proof offered in support of the original and amended motion, with the attending circumstances, *unerringly points to the fact that Goldstein's trial testimony was false.* The finding of the trial court to the contrary was, in our judgment, an abuse of discretion." (Emphasis supplied.)

⁶⁰ In *Corica v. Ragen*, 140 F. 2d 496 (Evans, Kerner and Minton, JJ.) the court below found that the trial court had improvidently issued a preliminary injunction. The court dissolved the injunction, deeming its issuance an abuse of discretion on the basis of the facts disclosed by the defendants' affidavits and because "the only grounds for granting the injunction were to be found in the unsupported, contradicted and impeached affidavit of plaintiff * * *" (p. 499). The trial court's reliance in this case solely upon the "unsupported, contradicted and impeached" affidavits of Goldstein was equally clearly an abuse of discretion.

Again, dealing with the trial court's reliance on the *Berry* case as being the rule of law that governs consideration of the motion (AR. 136) the appellate court said (AR. 228):

"We think that *logic and sound reasoning* require the application of a different rule". (Emphasis supplied.)

It is therefore submitted that the Government's contention that the appellate court did not determine whether the trial court's factual conclusions were unreasonable is utterly without merit. Its statement that the court's conclusions are contrary to the facts disclosed by the record is attempted to be supported by cross-reference footnotes (Br. 73-74, note) to the Government's own evaluation of the affidavits in its argumentative statement of facts. As shown in footnotes 52 to 59 *supra*, the Government's argument discloses inferences and suppositions from the evidence so tenuous that they necessarily dissolve in the face of the solid block of direct and corroborative evidence to the contrary.

Opportunity of trial court to observe demeanor of witnesses at trial cannot affect scope of appellate review of orders based solely on affidavits and documentary evidence.

—The circuit court of appeals, contrary to the Government's contention (Br. 77) did not hold that the scope of review was enlarged "because some of the evidence under consideration may consist of affidavits or documents." The court below merely held that where the evidence impelling to its conclusion was all by affidavit or in documentary form, and the trial court had obviously neither seen nor heard the witnesses, the appellate court can take cognizance of the fact that it is in as good a position to evaluate the testimony as is the trial court (AR. 226). Therefore, having held that consideration of such evidence

created the conviction that the conclusion of the court below was without support in reason there was not present the additional factor—that the court below had had opportunity to observe the demeanor of the witnesses—which might otherwise cause the appellate court to even then forbear to hold the action of the trial court unreasonable.

Where, as here, the record is entirely documentary, it is the clear duty of the reviewing court in any event to examine the record and determine for itself the meaning of the written evidence. As pointed out by Robert L. Stern, *Review of Findings of Administrators, Judges and Juries* (1944), 58 Harv. L. Rev. 70, 112-113:

“But where the evidence is entirely documentary or otherwise undisputed, the appellate court is in as good a position as the trial judge to determine the facts and to draw inferences of fact.”

(See also *id.*, pp. 111, 114.) The discussion of this point is elaborately documented with supporting authorities. This has long been the recognized rule. *The Natal*, 14 F. 2d 382, 384 (C. C. A. 9) cert. den. 273 U. S. 748; *Uihlein v. General Electric Co.*, 47 F. 2d 997, 1001 (C. C. A. 7); *Nashua Mfg. Co. v. Berenzweig*, 39 F. 2d 896, 897 (C. C. A. 7); *Kaesser & Blair v. Merchants Ass'n*, 64 F. 2d 575, 576 (C. C. A. 6); *The Marsodak*, 94 F. 2d 339, 341 (C. C. A. 4); *United States v. Corporation of the President, etc.*, 101 F. 2d 156, 160 (C. C. A. 10); *Groves Laboratories v. Brewer & Co.*, 103 F. 2d 175, 178 (C. C. A. 1); *Himmel Bros. v. Serrick Corporation*, 122 F. 2d 740, 742 (C. C. A. 7); *Bowles v. Carnegie-Illinois Steel Corp.*, 149 F. 2d 545, 546 (C. C. A. 7). It has been given the same application in cases where the relief involved was discretionary. *Nashua Mfg. Co. v. Berenzweig*, *supra* (citing *Elbers et al. v. Chicago Printed String Co.*, 39 F. 2d 815); *Corica v. Ragen*, 140 F. 2d 496. It is equally applica-

ble in cases involving review of action on motions for new trial. *Hamilton v. United States*, 140 F. 2d 679, 681 (App. D. C., 1944), reversing *Hamilton v. United States*, 31 A. 2d 887 (see dissenting opinion, p. 891); *Arbuckle v. United States*, 146 F. 2d 657 (App. D. C., 1944).

The government relies (Br. 77-78) on the fact that at the trial the trial judge had seen and heard Goldstein as well as some of the other witnesses whose affidavits are submitted, as a reason for abrogating the recognized rule.

But it seems obvious that even if all of the witnesses whose affidavits are submitted in support of the motion for new trial had been witnesses in the main trial and their demeanor observed by the trial court, he would be in no better position than the appellate court to determine the truth of matters stated in their affidavits in this court.

Demeanor as an aid to evaluation of a witness' truthfulness is limited to the demeanor of the witness on the stand at the time he is swearing to the testimony being evaluated.

The error is emphasized when the affidavits in question relate to matters not covered in the trial testimony, for even if it be assumed that the trial court clearly decided to disregard the affidavits of those who were also witnesses because of their shifty or evasive demeanor at the trial, he could do so only by concluding that under any and all circumstances those witnesses would lie. Conversely, under such a rule, he could accept their affidavits only if by reason of their demeanor at the trial, he had concluded that under any and all circumstances they would tell the truth.⁶¹ The obvious invalidity of this necessarily under-

⁶¹ Aside from its obvious invalidity as an abstract proposition, the absurdity of such a conclusion in this instance is shown by the fact that 23 men constituting a Grand Jury were so convinced that Goldstein lied on the stand before them in an investigation of income tax evasion by Skidmore that they returned an indictment against him, still pending, for perjury (2 MR. 65).

lying assumption exposes the fallacy of the Government's contention. However, the Government would have this court go much further and find in substance that because Judge Barnes was beguiled by Goldstein's frank and honest countenance, at the trial, he can on the basis of his recollection of Goldstein on the witness stand, properly reject the testimony of any other person who gives evidence to prove Goldstein, despite his convincing demeanor, was not truthful and, in fact, was defrauding the court by giving false testimony. No responsible court has ever claimed as much for itself or for any trial judge. In fact, the contrary has been squarely held. *Hamilton v. United States*, 140 F. 2d 679; *Arbuckle v. United States*, 146 F. 2d 657.

The trial court obviously could not have weighed Goldstein's demeanor against Fowler's demeanor, *for he never saw Fowler*. Nor did he see any but a few of the witnesses whose affidavits were submitted by defendants. He, therefore, had no basis for weighing their demeanor against Goldstein's demeanor. To assume, *without seeing them*, that these witnesses would on the witness stand have demeaned themselves less convincingly than did Goldstein, would constitute a clear abuse of discretion.

We have not charged that the trial court abused his discretion by doing so because we can find no basis in his opinion for concluding that he made this error. It is apparent, however, that if the Government's contention that he did so be accepted, the Government has called to the court's attention a further and most serious error on the part of the trial court.

The Government asserts, without citation, that the majority opinion below "indicates a misunderstanding of the factual issues and a lack of familiarity with the trial testimony" (Gov't Br. 78). This assertion is unsupported

and alleged examples given in the footnote on Gov't Br. pp. 73-74 have been shown to be utterly without support. The opinion of the trial court despite its length suppresses the significant content of many of the affidavits and arrives at its conclusions by a definite confusion of the issue of ownership to which similar evidence was directed at the trial and the issue of falsity to which the affidavits in support of the motion and amended motion for new trial were primarily addressed.

Having found that the Trial Court abused its discretion in that its findings from the evidence were without support in logic or reason, and having found that the trial court applied the wrong rules of law, the appellate court had full power to proceed to a complete disposition of the case. R. S. sec. 701, 28 U. S. C. ⁸⁷⁶ made applicable to the Circuit Court of Appeals in the Act of March 3, 1891, c. 517, sec. 11, 26 Stat. 826; see *Ballew v. United States*, 160 U. S. 187, 201-202; *Realty Co. v. Montgomery*, 284 U. S. 547, 550; *Cole v. Ralph*, 252 U. S. 286, 290. The court below did not substitute its findings for those of the trial court. It made findings because no findings under the applicable rule of law had been made by the trial court.

The only point in the Government's brief in form addressed to the action of the court whose judgment is sought to be reviewed is, therefore, without merit.

CONCLUSION.

The only point of law here urged by the government and open for consideration on the writ, if lack of specification of error be disregarded is plainly without merit. The other contentions of the government as well signally fail to present any ground for reversal of the circuit court of appeals. The circuit court of appeals clearly conceived the prevention of use of perjured testimony in

criminal prosecutions to be a matter of public interest at least as great as that involved in guarding against perjury and inequitable conduct in the exploitation of the patent laws. *Precision Co. v. Automotive Co.*, 324 U. S. 806, 816 reversing 143 F. 2d 332 (C. C. A. 7). That view has been repeatedly affirmed by this Court. *United States v. Atkinson*, 297 U. S. 157, 160; *Johnson v. United States*, 318 U. S. 189, 200.

Wherefore it is respectfully submitted that the judgments of the court below should be affirmed.

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APPENDIX.

1. *Bon Air Country Club.*

Goldstein's testimony concerning the Bon Air Country Club was that he carried on negotiations for its purchase at the request of Johnson; that he purchased the property with \$75,000 he received from Johnson, that title to the property was the first taken in the name of Ted W. Goldstein and subsequently a quitclaim deed was delivered to Johnson.

The Bon Air Country Club was purchased by Goldstein in the latter part of 1937 (2 MR. 57). Goldstein told Fowler (R. 213) "that he had bought the property known as the Bon Air Country Club for his client, Mr. William Skidmore, . . ." and "That Mr. Skidmore had given him (Goldstein) the money to buy the said Bon Air Country Club property.* On one occasion Goldstein told Fowler to have a picture of this property enlarged and framed saying, "The Boss (Skidmore) has enough money in the place. He ought to have a picture to look at" (R. 215). Before Goldstein purchased this property for Skidmore, Skidmore had unsuccessfully negotiated for its purchase through Sam Hare who collaborated with Goldstein in the negotiations (3 MR. 914). Skidmore had the property appraised prior to its purchase by Goldstein by Joseph Nadherney, an architect (R. 98).

Henrichsen who had been employed by William R. Skidmore during the years 1934 to 1937 inclusive swore: "That in the month of December 1937 one William Goldstein came to my home one evening on or about December 15, 1937, and the said Mr. Goldstein stated to me that William R. Skidmore told him to come to my home to inform me that I was to be the caretaker at the Bon Air Country Club and that I was to report to Mr. Becker at the Evanston State Bank the next morning for a letter of instructions; that this affiant told the said Mr. Goldstein that he wanted his instructions from Mr. Skidmore, whereupon Mr. Goldstein took

*This corroborates not merely defendant Johnson's testimony (3 MR. 955 *et. seq.*) but also the testimony of Edward Wait (3 MR. 896).

this affiant to the home of Mr. William R. Skidmore at 3500 Sheridan Road, Chicago, Illinois; that he saw Mr. William R. Skidmore at the said place and Mr. Skidmore said I was to be caretaker at the Bon Air Country Club and to get my instructions from Mr. Becker; that Mr. Skidmore stated that he had bought the said Bon Air Country Club." (R. 91).

Skidmore offered to sell defendant Johnson a half interest in it. Johnson, after inspecting the property at Skidmore's suggestion, accepted his offer and agreed in the early part of 1938 to purchase a half interest in the property (3 MR. 956). At the time of purchase the property was in foreclosure. Goldstein acquired the rights of all the bondholders and had Peacock appointed trustee. He did not have title "first taken in the name of Ted W. Goldstein" (R. 194). More than a year and a half later Goldstein arranged for the transfer of the title to Johnson. At the time he delivered a deed to Johnson he had Johnson execute a quitclaim deed conveying back to Skidmore an undivided one-half interest in the property (3 MR. 963, 964). Goldstein had the deed to Johnson and the quitclaim deed which conveyed to Skidmore a $\frac{1}{2}$ interest in this property prepared by Mrs. Marsh in his office (R. 163-165), and after signature by Johnson, had the quitclaim deed acknowledged by William Peacock (R. 188). Extensive improvements were made to the property by Skidmore and Johnson under the close personal supervision of Skidmore who personally paid out large sums in payment therefor (R. 82, 86, 94, 104, 105, 107, 110, 162, 167, 174, 186). After the club had been remodeled and was opened by Skidmore and Johnson, Skidmore continued to exercise an extremely active supervision over it in all matters, including hiring and firing the employees, employment of talent for the floor shows, ordering food for the restaurant, and the like (R. 99, 103, 109, 120, 122, 173, 176).

Shafron states (R. 81) "That in the month of January or February 1938 he called on the said Mr. William Skidmore at his place of business located at 2840 South Kedzie, Chicago, Illinois. That on the occasion of that visit the

said William R. Skidmore stated to him that he, Skidmore, and Bill Johnson owned the property known as the Bon Air Country Club, north of the town of Wheeling, Illinois." Skidmore admitted his proprietary interest in it on numerous occasions after the trial of these cases was commenced (R. 83, 91, 99, 101, 109, 112, 213). Skidmore told Henrichsen that he had paid the real estate taxes on this property and had the paid bills in a safe deposit box (R. 95). In order to protect Goldstein from disclosure of the latter's false and perjured testimony to the effect that he had made the original purchase for Johnson with money given him by Johnson (2 MR. 57, 58), Skidmore agreed, at Goldstein's solicitation, not to interpose any defense in a partition suit commenced by Johnson to force a public disclosure of Skidmore's interest (R. 90, 101). Goldstein acted as Skidmore's agent in several matters concerning the Bon Air after its purchase. Henrichsen for example swore (R. 92) that during his employment at the Bon Air Country Club from on or about December 15, 1937 up to March 1, 1938 he received his salary for his services from William Goldstein who stated to him that Skidmore furnished him the money and directed him to pay Henrichsen his salary. The Bureau of Internal Revenue served a notice of lien on the operating corporation for this property in an attempt to attach Skidmore's assets for the payment of his delinquent taxes (R. 62-63).

2. Curran Farm.

Goldstein testified that he, acting on the request of Johnson, purchased the Curran Farm with currency provided by Johnson and that a deed to the property was delivered to Johnson (2 MR. 58, 59).

The title to this property was taken in the name of a dummy at the time of purchase. Goldstein recorded title to this farm in Johnson's name on July 21, 1939. At the time he delivered a deed to Johnson covering this property he had Johnson execute a quitclaim deed conveying an undivided one-half interest in the farm to Skidmore (3 MR. 963, 964). The quitclaim deed conveying an undivided

one-half interest back to Skidmore, like the one for the Bon Air, was prepared by Beatrice Marsh in Goldstein's office (R. 164), and acknowledged by William R. Peacock (R. 188).

Shortly after Goldstein closed the deal Skidmore inspected it and said he had bought it. Marie Schmidt and her son (R. 191, 192) who lived in the farm house were given notice to quit by Henrichsen whom Skidmore told he had purchased the farm (R. 86, 87); and later by Goldstein, acting on behalf of Skidmore (R. 191, 192). Alice Kemp (R. 120) an employee of Skidmore's was permitted by him to reside in the farm house at Henrichsen's suggestion (R. 120, 121). She was cautioned not to disclose Skidmore's interest in the property (R. 122). The landlord's share of the crops was claimed by Skidmore through Goldstein from Stewart Peters, (R. 187), who farmed the property on shares and who dealt only with Henrichsen and Skidmore's lawyer, Goldstein (R. 187). In the year 1940 Skidmore ran the farm through Henrichsen. When the harvest was in, Skidmore's trucks came and hauled away the landlord's share of the crops (R. 93, 124, 187). Skidmore employed a farm manager for the Curran Farm upon the recommendation of Frank Fowler, at Goldstein's request. Goldstein told Fowler he bought the Curran Farm for the Boss, Mr. Skidmore (R. 215). Goldstein, as Skidmore's agent, directed Henrichsen to chop down an advertising sign on the property. Skidmore countermanded this order (R. 88). In the summer of 1939 Goldstein notified the General Outdoor Advertising Company (R. 144) that he was agent for the property and that the rent of \$25.00 a year for the sign on the property should be paid to him. Goldstein received and cashed three checks for \$25.00 each (R. 145-149). Two of these checks bear the endorsement not only of Goldstein but of Sam Cinofsky, an employee of Skidmore's (R. 145, 147, 174). None of the sums realized from any of these checks was ever tendered to defendant Johnson, nor was he advised of their receipt by Goldstein. Goldstein was never authorized by Johnson to act as his agent for any purpose in connection with the Curran farm property (R. 235).

3. Green House.

Goldstein's testimony concerning this property was that, at the request of Johnson, he purchased the property with \$8500 in currency furnished to him by Johnson, that title to the property was taken in the name of Ted W. Goldstein, and that thereafter a quitclaim deed was delivered to Johnson by Goldstein. (2 MR. 58).

The Green House was purchased by Goldstein through Frederick Kirschner, a real estate agent who represented Albert Tatge, the owner of the property. (R. 123)* Before he bought the property Skidmore had Nadherny appraise it for him and later told him that he had bought and furnished the "Green House." (R. 99). Johnson purchased a one-half interest in the property from Skidmore, and in the summer of 1939 Goldstein recorded the property in Johnson's name. At the time he gave Johnson the deed for the property he had him (3 MR. 963, 964) convey back to Skidmore by quitclaim deed an undivided one-half interest in it.

The quitclaim deed was prepared by Beatrice Marsh (R. 163) in Goldstein's office and Johnson's signature acknowledged by Peacock (R. 188).

Skidmore bought furnishings for this house and gave Henrichsen money to pay for them and Mrs. Skidmore helped to supervise the installation of the furniture (R. 92). Tatge bought back from Skidmore through Henrichsen a hot water heater and softener not being used in

*Kirschner swears (R. 123) that he considered the owners of the Bon Air Country Club as a likely prospect to purchase the property owned by Mr. Tatge. That he made due inquiry as to whom he might contact with reference to offering the Tatge property to the owners of the Bon Air property. That as a result of that inquiry he learned that Mr. William R. Skidmore would be the individual to see as the party interested in the Bon Air, and a possible purchase of adjacent property. That as a result of that inquiry he determined that Mr. Skidmore had his office at 2840 South Kedzie Avenue, Chicago, Illinois, and at that location saw Mr. William R. Skidmore and offered to him the purchase of the Tatge property aforementioned. That after some discussion, he said Mr. William R. Skidmore directed this affiant to see his attorney, William Goldstein, at Mr. Goldstein's office located at 140 North Dearborn Street, Chicago, Illinois. This affiant further says that in accordance with such direction from Mr. William R. Skidmore he did see Mr. Goldstein and that the sale of the Tatge property was consummated through Mr. Goldstein.

the house (R. 168). Henrichsen further swore that in January, 1940 (at about the time Goldstein's false testimony was given before the grand jury investigating Skidmore) Skidmore directed him to see Tatge, who was the former owner of the Green House, to caution Tatge not to mention Skidmore's name in connection with the purchase of that property. Henrichsen sought out Tatge and asked him whether he could prove that Skidmore had purchased the Green House and Tatge said that he could not (R. 95, 169).

4. White House.

Goldstein testified that he purchased this property with \$8,000 in currency received from Johnson, that he caused title to be taken in the name of Ted W. Goldstein, and that subsequently he delivered a quitclaim deed to the property to Johnson. (2 MR. 58)

Goldstein purchased this property in May, 1938 through Kirschner (R. 123). Skidmore had Nadherny (R. 99, 85) appraise this property, (as he did in the case of the Bon Air and Green House) for him before he bought it. Skidmore told Henrichsen he was going to buy it and later that he had bought it. Henrichsen was present when Nadherny made his appraisal. (R. 85) Johnson later bought a half interest in it from Skidmore. In the summer of 1939 Goldstein had title to this property recorded in Johnson's name and when he gave Johnson a deed, had Johnson (3 MR. 963, 964) execute a quitclaim deed conveying an undivided half interest in it back to Skidmore.

This deed also was prepared for Goldstein by Beatrice Marsh (R. 163-5) and, after signature, acknowledged by Peacock (R. 188).

Skidmore told Henrichsen that he had purchased this property and told him that he could live in it with his family. After the Bon Air closed Skidmore told Henrichsen (R. 94, 97) he could continue to live at the White House and Skidmore would pay him to act as watchman to protect Skidmore's interests at the Bon Air. Henrichsen and

his family did so (R. 94, 97). Fuel oil consumed on this property was purchased and paid for by Skidmore from the Sinclair Refining Company (R. 88, 179-84 in the winter of 1941-42).

5. Gas Station.

Goldstein testified that he purchased this property with \$4,000 in currency furnished him by Johnson and caused the title to be taken in the name of Ted W. Goldstein, and that subsequently he delivered a quit-claim deed to Johnson. (2 MR. 58).

This as well as the White House and Green House properties were purchased by Goldstein through Frederic Kirschner (R. 123). Skidmore also had this property appraised by Nadherny prior to its purchase (R. 99). Johnson (3 MR. 963, 964), as with the Bon Air and other adjacent properties, bought a half interest in the gas station property from Skidmore. In the summer of 1939 Goldstein recorded title to this property in Johnson's name and upon delivery of a deed to Johnson had him execute a quit-claim deed conveying back an undivided one-half interest in the property to Skidmore.

* This quitclaim deed like the others was prepared by Beatrice Marsh (R. 163-165) and, after signature, acknowledged by Peacock (R. 188).

Skidmore purchased and paid for the gasoline pumps for the "Gas Station" (R. 93). Skidmore personally arranged for the rental of the gas station to Walter Piper (R. 119), and Hengrichsen (R. 86) pursuant to direction from Skidmore turned over the keys to Piper. Later, Alice Kemp and her son at Skidmore's direction operated the gas station. (R. 121, 86).*

* It will be seen with respect to all of the five items listed above (the Bon Air and adjacent properties), that the same pattern was followed; Skidmore had Goldstein purchase them for him and later sold a half interest in them to Johnson. In the summer of 1939, when a Federal grand Jury instituted an investigation of Skidmore's tax evasion, Goldstein had title to these properties, up to then recorded in the name of dummies, recorded in Johnson's name. At the time of delivery of deeds to Johnson for these properties he had Johnson execute quitclaim deeds conveying back to Skidmore an undivided half

6. Facts as to "Dells" property.

Goldstein testified that he purchased this property at the request of Johnson with \$19,000 in currency furnished by Johnson, that title was taken in the name of Isador Goldstein, and that subsequently quit-claim deeds were executed by Isador Goldstein to Johnson and delivered to him by Goldstein. (2 MR. 59).

Skidmore learned through Sam Hare that the "Dells" property could be purchased cheaply. (R. 117). He advised Johnson of this fact and Johnson agreed to purchase a one-half interest in it with Skidmore. (3 MR. 955.) Skidmore handled the purchase of this property personally with Goldstein and Hare through one Eli Herman, attorney for the property owner. (R. 231.) The owner of the property was one Fred Huscher who was informed by Goldstein during the course of the negotiations that Skidmore was one of the prospective purchasers. (R. 178.) (Goldstein denied that he mentioned the name of the purchaser to Huscher.) (R. 260.) Skidmore himself inspected the property and talked with Huscher before the deal was closed. (R. 178.) Skidmore agreed to buy it at a Sunday conference at his apartment with Goldstein, Herman, Huscher's lawyer, and Hare. He offered Herman \$10,000 in cash on that occasion but Herman said he did not want to take the money at that time. Goldstein said that he would get the money next day and deliver it at the Chicago Title and Trust Co. (R. 231). Goldstein's testimony confirms the fact that he went to the Trust Company with the money. (2 MR. 59.) Shortly after the deal was closed Skidmore removed some iron rods and a number of tables and chairs

interest in them; both the deeds to Johnson and the quitclaim deeds were prepared under Goldstein's direction by Mrs. Marsh, who was employed in Goldstein's office, and Johnson's signature to all of them was acknowledged by Peacock, an associate of Goldstein's. So far as Johnson was concerned it was of no moment to him that his one-half interest in these properties might become known to the world, as his reported income was more than adequate to account for his expenditures in connection with the properties. He obviously did not realize that this transfer of nominal title was a step in Goldstein's and Skidmore's plan to charge him with 100 per cent ownership of the properties so that Skidmore would not be charged with expenditures which could not be reconciled with his reported income. (See *United States v. Skidmore*, 123 Fed. 2d 604, 608-609.)

from the property. (R. 177, 178.) In the spring of 1937 Skidmore removed some concrete lamp posts from the property. (R. 175, 177.) Skidmore paid Hare (R. 118) \$500 for his services in the acquisition of the property, and paid Herman (R. 232), through Goldstein, \$300 attorney's fees. After the deal was closed, Johnson paid Skidmore one-half of the cost of the acquisition, as is evidenced by a receipt in Skidmore's own handwriting listing the costs of acquisition of the property including payments for services to Hare, Herman, and Goldstein in the amounts each admitted he received. (R. 159) Skidmore told his employee, Heinrichsen, that he had acquired a one-half interest in this property. (R. 95.) Goldstein several times discussed Skidmore's purchase of the property and his plans for rebuilding it with Hare in the presence of Pearl Ferguson. (R. 189.)

7. Facts as to 9730 Western Avenue property.

Goldstein testified on direct examination with respect to this property (as he had with respect to all of the other properties mentioned above) that he had bought it for Johnson with money given him by Johnson and that he delivered the deed to Johnson (2 MR. 55, 56).

Skidmore, at about the time the "Dells" deal was closed with Huscher, told Johnson of his proposed purchase of property at 9730 Western Avenue and asked Johnson to take a one-half interest in it. Johnson agreed (3 MR. 973.) Skidmore had Goldstein purchase the property.

Goldstein (2 MR. 65) admitted on cross-examination (when confronted with the quitclaim deed for one-half interest he had delivered to Johnson) that Johnson had only a one-half interest in it, and that he had given a quitclaim deed to Skidmore for the other one-half interest.*

* Defendants moved to reserve cross examination of Goldstein on properties other than the "Dells" and 9730 Western Avenue after he identified a memorandum receipt to Johnson in Skidmore's handwriting which itemizes various costs of acquisition of the "Dells", and had admitted Johnson owned only a half interest in the 9730 Western Avenue property. This motion was denied on objection of Assistant United States Attorney Hurley. (2 MR. 67.) Defendants, taken by surprise by Goldstein's testimony, and not being prepared, could not cross-examine him concerning his other testimony.

Nadherny designed and supervised the construction of a building on this property, and was paid \$22,400 by Skidmore (2 MR. 79), which covered the cost of the improvement. Johnson paid Skidmore one-half of the cost of acquiring and improving this property. (3 MR. 973.) Skidmore told Henrichsen that he owned this property. (R. 89, 90.)

8. \$10,000 escrow.

Goldstein testified (2. MR. 61) that Johnson gave him \$10,000 to be placed in escrow for the purchase of certain property lying between the Curran Farm and the Bon Air Country Club and that he placed the \$10,000 in escrow with the Chicago Title and Trust Co.

On November 1, 1940, Goldstein wrote to Holleran (R. 130), attorney for John W. Guild, trustee for the owners of the property, disclosing a demand on the Chicago Title and Trust Company for the return of the \$10,000 escrow deposit to Goldstein. Shortly thereafter a meeting was arranged in Holleran's office between the latter, William Goldstein, Isador Goldstein* (Goldstein's partner) and Mr. Guild. (R. 131-132.) Goldstein there stated that he represented himself and that he wanted the deposit returned. Holleran stated that there was a lawsuit pending for damages against the Bon Air Country Club and that before he Holleran would authorize the Chicago Title and Trust Company to release the escrow, an adjustment of expenses would have to be made.

Goldstein replied that he had no interest in the Bon Air Country Club; that his only interest was in the return of the \$10,000; that the \$10,000 was his (Goldstein's) money and had nothing to do with the club. He offered \$100 to compensate for attorneys' fees and expenses if the deposit would be returned to him. (R. 133, 134.) One Joe Miller, an attorney acting on Goldstein's behalf, renewed the \$100

* Isador Goldstein was not called upon by the government to furnish an affidavit denying the facts as sworn to by Holleran.

offer, and on November 6, 1940, wrote Holleran regarding the same subject matter. Holleran inquired of Goldstein whether "Uncle Sam had any objection" to any withdrawal of the escrow; Goldstein said the Government had nothing to do with it, that it was his money, and was in no wise involved in the Government case. (R. 134.) Goldstein said "All I am interested in is my money. It is my money I put up and you can't deliver under the contract and I want my money back." (R. 135, 136.) Goldstein told Fowler (R. 214) when Fowler told him that money was needed by the Waukegan Post that he (Goldstein) had this \$10,000 deposit available. Henrichsen (R. 95) states that Skidmore told the affiant that he (Skidmore) had \$10,000 in escrow and that Johnson had no interest in the \$10,000 and that he (Skidmore) had attempted through William Goldstein to withdraw the said \$10,000 from escrow.

Goldstein in a rebuttal affidavit (R. 252) swears "I do not recall at any time stating that it was my money; there would be no purpose in making that statement." He also claims that he was served with a notice by the Collector of Internal Revenue, in early 1940 covering all property and money he then held belonging to Johnson. (R. 261.)

9. \$7500.00 escrow.

Goldstein testified at the trial with respect to this item that, "The amount of money involved was \$7,500, deposited at the State Bank of Evanston, in the form of currency, by myself, which I received from Mr. Johnson. I made the deposit at his request." (2 MR. 61.)

Shortly after the trial of this cause in the District Court on October 30, 1940 Goldstein withdrew this money from escrow. (R. 185) He did not advise Johnson of its withdrawal nor has he made any tender of it to him. (Goldstein admits this but claims he is holding the money subject to a notice from the Collector of Internal Revenue for Johnson's allegedly delinquent taxes, served on him early in 1940. R. 261.) Johnson testified that the money was not his and had not been given to Goldstein by him. (3 MR.

957.) Goldstein told Fowler that the \$7500.00 escrow deposit belonged to him at the time of the discussion concerning the need of the Waukegan Post for additional money, and later told Fowler he had withdrawn it. (R. 214.)

10. Albany Park Bank Building.

The Albany Park Bank Building was purchased by Goldstein from a receiver in July 1937. Title to the building was transferred on that date to his son, Ted Goldstein. The stock of the Albany Park Safe Deposit Vault Company was also transferred by the receiver to Ted Goldstein at that time as a part of the same transaction. (R. 151.) On the day that Ted Goldstein took title he leased part of the premises to the Vault Company for the continued carrying on of the business of that company. (R. 153.) William Goldstein was made President and Director of the Company. Louis Levinson* was made Secretary and Director and Ted Goldstein Director. In September 1941 Goldstein as agent for his son, Ted, leased the building to the Hines Realty Company and under that lease all of the stock of the Albany Park Bank Building was transferred to Frank Sampson, owner of the Hines Realty Company. (R. 202.)

The Goldsteins and Levinson thereupon ceased to be officers and directors of the company and Frank Sampson, M. H. Optner and Marshall Sampson became the new directors with Frank Sampson as President. Goldstein has also given Sampson an option to purchase this building. (R. 38.) Goldstein has collected the rents of \$250.00 per month under this lease and has cashed the rent checks for his private account after endorsing them William Goldstein, Agent, and then William Goldstein. (R. 199, 200.) This lease is still in force. Prior to leasing the premises to Sampson, who operates a real estate business there (R.

* Louis Levinson was a co-incorporator with Goldstein of the Portage Park Safe Deposit Vault Company, a corporation utilized by Skidmore in connection with the Portage Park Safe Deposit Bank Building, a property owned by Skidmore and managed for him by Goldstein. The outstanding perjury indictment against Goldstein is based upon false testimony concerning activities in this building, given before the Grand Jury investigating Skidmore's income tax evasion.

201), Goldstein for a time leased part of them to co-defendant Brown, who ran a currency exchange there.

In August of 1943 Goldstein stated to Leo Blockus (R. 199) representative of the County Treasurer, who had instituted a tax receivership proceeding against the property, that he, Goldstein, owned the building. (Goldstein denies making this statement, R. 264.) Goldstein offered to pay, first, \$150, and later \$250 a month out of the rents of this property to the County Treasurer as receiver (R. 198, 199) and, at the insistence of the County Treasurer's Office took out insurance covering the property, the premium on which was over \$300. (R. 206-212) Sampson, Goldstein's tenant, told Levine and Blockus in the course of official discussions relating to the tax receivership, that he had an option to purchase the property. (R. 202, 338.) He told Louis Baum, his business associate, that he had such an option when Baum was discussing with him the formation of their business association, mentioned it on several other occasions and again stated that he had the option after the tax receivership proceedings were instituted. (R. 336.) Sampson states that he does not hold such an option in his own name nor in the name of the Hines Realty Company, but does not state whether or not he holds it through the Albany Park Safe Deposit Vault Company, of which he is sole stockholder or through some other company. (R. 315.) Goldstein does not deny the existence of the option to Sampson nor the leasing of the property to him, nor that he has collected and cashed for his own account the rent checks. He states that he is holding the rent monies collected under the lease made in October 1941 subject to the "notice" mentioned above served on him in April 1940. (R. 261.) Goldstein makes no claim that he ever was authorized to act for Johnson as agent in the management of this property. He admits that he has never made any report to Johnson concerning its rental and has never advised Johnson of the fact that it was rented or tendered any of the rents to him (R. 253.)

Miss Sommer, former employee of Goldstein, swore that Goldstein caused income statements of this property to be

prepared monthly, in his office, and forwarded to Skidmore. (R. 165.) (Goldstein denies this R. 254.) Miss Marsh, another employee, swore that service bills on the property were by her, at Goldstein's instructions, sent to Sampson. (R. 164, 165).

FEB 28 1946

CHARLES ELMORE DEMPSEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 115, 116

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM R. JOHNSON.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY
and STUART SOLOMON BROWN.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

HOMER CUMMINGS,
*Attorney for William R. Johnson,
Jack Sommers, James A. Hartigan,
William P. Kelly and Stuart Solomon
Brown, Respondents.*

WILLIAM J. DEMPSEY,
*Attorney for William R.
Johnson, Respondent.*

HAROLD R. SCHRADZKE,
*Attorney for Jack Sommers, James
A. Hartigan, William P. Kelly and
Stuart Solomon Brown, Respondents.*

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and STUART SOLOMON BROWN.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

Respondents submit this their petition for rehearing for the reasons hereinafter more fully set forth. It is pertinent, however, to note that the opinion of this Court lays great emphasis on the period that has expired since the original conviction, and the paramount importance of prompt enforcement of sentences. We do not need to dwell on the length of time during which the case lay undecided here. This Court is fully familiar with the record in that

regard.¹ The suggestion that the right to seek a new trial has been abused is, on the record, also something less than fair. We assume that we are not expected to concede that appeal from denial of a motion for new trial is lacking in merit when we contend that the conviction is tainted by demonstrable perjury and when two long-experienced circuit court judges hold that false swearing by a material government witness is unerringly demonstrated by the evidence in support of such motion and that the conclusions of the trial judge to the contrary violate logic and reason. Counsel proceeded according to the rules as laid down by this Court. If there were any more rapid way to dispose of the motion and the amended motion,¹ it would be helpful if this Court would point it out or amend the rules to make such course clear. This is aside from the following points upon which we rely as eminently requiring reconsideration of this case.

I.

THE ORDER FOR MANDATE DEPRIVES RESPONDENTS OF THEIR RIGHT TO APPELLATE REVIEW OF THE ALTERNATIVE GROUND FOR NEW TRIAL.

The order for mandate at the foot of the opinion directs that the case—"be remanded to the district court to enforce the judgments against the petitioners." This deprives respondent of any appellate review of the ruling of the trial court on one of the alternative grounds for new trial. Respondents were entitled to new trial, as the trial

¹ In a case such as this where the subject of the false swearing is not merely an ephemeral occurrence but includes the alleged giving of a deed to property which the false witness nevertheless continues to enjoy as his own, it is, of course, inevitable that there will be continually appearing additional evidences of the perjury. The tax returns which occasioned the amended motion for new trial in this case are only an instance of others that may be expected to occur in the future. The continuing adverse effect on the public reputation of the administration of justice is obvious.

court impliedly recognized, if the evidence either showed (1) under the *Larrison* case doctrine that on the issue of false swearing it is reasonably clear that Goldstein swore falsely and that without such testimony the jury might have reached a different conclusion, thus depriving respondents of their constitutional right to a fair trial; or showed (2) that on the issue of guilt or innocence of the accused under the *Berry* case doctrine, the evidence is not *merely* cumulative or *merely* impeaching and is so material that it would probably produce a different verdict.

The trial court concluded on the evidence (1) that Goldstein had not sworn falsely and (2) that the evidence was merely cumulative or merely impeaching and not so material as to probably produce a different verdict.

These were obviously not *alternative grounds of decision*; they were rulings on *alternative grounds for granting the motion*. As such, they were obviously both essential to support the order denying the motion. Errors (including errors of law by the trial court in considering the affidavits of the government as admissible in evidence and interpreting the rule of law stated in the *Berry* case) were assigned the holdings as to the second ground (assignments of errors Nos. 4, 9, 25, 35, 37, 38, 40, 48, 50, 57, 58, 59, 60, AR. 191, 195, 196, 198, 199).

Because the circuit court of appeals found the trial court had abused its discretion in overruling the first ground, it did not pass on this second ground for new trial or upon the correctness of the trial court's ruling thereon, although it did refer to the obvious errors in law of the trial court in dismissing as "merely cumulative" any affidavits that happened to relate to an issue in dispute at the trial (AR. 230).²

This Court now holds by its most recent opinion that although the second ground for new trial was not considered by the circuit court of appeals, respondents nevertheless

² These errors alone justified the reversal by the circuit court of appeals since they relate to a large part of the evidence. The opinion of this Court does not even advert to that determination by the court below.

are to be denied new trial upon the decision, thus made final, of the district court without any appellate court having given any consideration to this second ground.

It is expressly stated by this Court (p. 3, footnote 4):

" * * * An alternative ground for the Court's denial of the motion need not be considered here. * * * The alternative ground was that all of the so-called newly discovered evidence was either not newly discovered or merely cumulative or impeaching, and in any event would probably not produce a different result."

Of course, as pointed out above this was not an "alternative ground for the Court's denial of the motion." It was a holding essential to dispose of an alternative ground for granting the motion. "And this Court is under no duty to make law less than sound logic and good sense." *New York v. United States*, Sup. Ct. U. S., January 14, 1946 (90 L. Ed. 265; 267). That the Court's opinion confuses alternative grounds for relief and alternative grounds for decision is clear. It is equally clear that neither the appellate court nor this Court has passed on the question, although it was here relied on to sustain the judgment of the circuit court of appeals (Resp. Br. 88-96). The cause should, therefore, be remanded to the circuit court of appeals so that it may pass on the questions reserved. *United States v. Ballard*, 322 U. S. 78, 88; *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 267-268; *Brown v. Fletcher*, 237 U. S. 583; *Grant v. A. B. Leach & Co.*, 280 U. S. 351, 363.

II.

THE ORDER FOR MANDATE ALSO MODIFIES THE PRIOR JUDGMENT OF THIS COURT AND WITHOUT HEARING DEPRIVES RESPONDENTS OF THE RIGHT OF REVIEW THERE RECOGNIZED.

At the foot of the opinion of this Court reversing the judgments of the circuit court of appeals which had in turn reversed the convictions of respondents on the original trial, this Court directed that the cause be—

"remanded to the circuit court of appeals for proper disposition in accordance with this opinion" (319 U. S. 503, 520).

This Court there recognized that respondents were entitled to judicial review of numerous assignments of error with respect to the proceedings on the original trial which had not then and have not yet been considered by either the circuit court of appeals or this Court.

But the opinion of this Court filed February 4, 194⁶ now directs that the case be—

"remanded to the district court to enforce the judgments against the petitioners."

This direction for mandate unjustly penalizes respondents for having sought to vindicate their constitutional right to a fair trial.

Many of the errors assigned and relied upon by the defendants in the original appeal to the circuit court of appeals from the judgments of conviction were directed to matters arising in the course of the trial. With three exceptions none of them were found by the circuit court of appeals necessary to be considered. These were expressly reserved by the circuit court of appeals when it reversed the conviction. *United States v. Johnson*, 123 F. 2d 111, 128. They were relied upon in this Court to sustain the judgment but this Court did not pass upon any of the assigned errors not discussed by the circuit court of appeals. In accordance with the usual practice to which citation is made above (p. 4), the order for mandate included in the opinion of this Court directed that the cause be "remanded to the circuit court of appeals for proper disposition in accordance with this opinion" 319 U. S. 503, 520. Respondents rely on and believe that these assigned but as yet unconsidered errors then left open for consideration by the court below clearly show that reversal of the judgments of conviction is required.

Respondents believed that the constitutional right to a fair trial extends to them, that it is more than an abstraction, and that it might properly be asserted with vigor in the courts. They took as being more than platitudes statements such as that recently made by this Court in *In the Matter of Michael* (Sup. Ct. U. S. November 5, 1945):

"All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial."

and in *New York Central R. R. Co. v. Johnson*, 279 U. S. 310, 318:

"The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted * * *"

In *United States v. Atkinson*, 297 U. S. 157, 160, this Court emphasized the importance of correcting errors if they "seriously affect the fairness, integrity of public reputation of judicial proceedings." And this same paramount objective was reaffirmed in *Johnson v. United States*, 318 U. S. 189, 200.

Upon the filing of this Court's judgment June 7, 1943, defendants had newly discovered evidence that they believed demonstrated perjury of the key Government witness. (To this day neither the dissenting Judge Minton in the court below nor any member of this Court has indicated a contrary view as to the effect of the evidence.) Accordingly, respondents, without then pressing for review of the remaining assignments of error, but without waiving them, promptly moved in the circuit court of appeals to remand to the district court in order there to move for new trial. Nothing in this Court's most recent opinion suggests they should for any reason have delayed longer in so doing. Indeed, the emphasis is on expedition in the making of such motions.

Neither on the petition nor on the writ, was any question raised as to the correctness of this Court's prior mandate or as to respondents' right to appellate review of their remaining assignments of error with respect to the original trial. Nevertheless, this Court now directs that the case "be remanded to the district court to enforce the judgments against the respondents".

Apparently because respondents have fought stubbornly for what they believed to be right and to correct what two circuit judges have found to be a clear and highly prejudicial wrong, they are to be penalized, and deprived of all right to an appellate review of the errors of the court during the course of the original trial. Such a result is foreign to the genius of our judicial system. It should be corrected.

III.

THE DECISION OF THE COURT DEPRIVES RESPONDENTS OF A NEW TRIAL ON A GROUND NOT ADVANCED BY THE GOVERNMENT AND ON WHICH RESPONDENTS HAVE HAD NO OPPORTUNITY TO BE HEARD.

The disturbing element in this Court's opinion is that it decides the case on a point of law in which respondents have never been heard. The point was not raised in the petition of the Government; nor was it specified as error or argued by the Government on the merits. Yet this Court states in its opinion (p. 3) that it was this question that motivated grant of the writ:

"Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motion for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari."

Although there was no hint of this question in the Government's petition, this Court gave no indication, either at the

time of granting the writ or later, that it desired argument on this question. Nor on oral argument in this Court were any of the many questions directed to respondents' counsel even remotely related to this point on which the case is now made to turn.³

The Government assumed that the abuse of discretion rule applies in the case of a motion based on newly discovered evidence (Gov't Br. 68).

The Government also conceded (Br. 75-76):

"Abuse of discretion consists of arbitrary action—action which is unreasonable, against logic and for which there is no justification in the facts or inferences to be drawn therefrom. Thus, as respondents have urged (see R. 502) and as the court below held on its first opinion on review of respondents' motion, the appellate court's function, in respect of factual issues, is to determine whether the trial court's conclusions from the evidence are unreasonable, arbitrary or capricious."

Significantly the Government also conceded (Br. 77):

"In exercising that function the appellate court must of course consider and in a sense weigh the evidence, but its consideration of the evidence must be directed toward a determination of whether there is any justification or basis in reason for the trial court's conclusions." (Emphasis supplied)

And the Government put the issue when it said (p. 72-73):

" * * * the majority frankly abandons any attempt to determine whether the trial court's factual conclusions are reasonable; * * * Nowhere in their opinion do the majority state that the trial court's conclusions are unreasonable, arbitrary or capricious."

³Indeed, the Government's Brief stated the question to be "Whether the trial court abused its discretion in denying respondent's amended motion for a new trial purportedly based on allegedly newly discovered evidence that a Government witness testified falsely at respondents' trial." (Emphasis supplied) There were no specifications of error, of course.

On this issue, as thus presented, this Court has found against the Government, for the opinion states (p. 3):

"The majority of the court reviewed parts of the affidavits and concluded from them that *the trial judge's finding that Goldstein did not commit perjury was illogical and unreasonable.*" (Emphasis supplied)

But this Court now states as controlling a new and different rule (p. 4):

"But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motion for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren v. United States*, 217 U. S. 509; *Holt v. United States*, 218 U. S. 245; *Fairmont Glass Works v. Coal Co.*, 287 U. S. 474, 481."

(1) The Reasoning of the Fairmont Case Has No Application.

Citation now of the decisions relied upon by this Court ignores twelve years development in the law and the distinctions in fact which eliminate the technical difficulties stated in the *Fairmont* case as impeding review of orders on motion for new trial.

Of course the opinion of the appellate court could not within any reasonable bounds detail each and all of the individual affidavits. The unreasonableness of the action of the District Court was sufficiently disclosed when it appeared that the credence given to certain of the principal affidavits of Goldstein and the discredit attached to contradicting affidavits introduced by the respondents was without any justification in logic or reason.

In *Holmgren v. United States*, 217 U. S. 509 (1909) the motion for new trial was addressed to error in the conduct of the trial in permitting the indictment to be taken to the jury room with indorsement showing defendant's prior conviction on one count and order for new trial. Treating the question as a possible matter of plain error, although not properly raised in the record, the court held on the merits that no prejudice resulted. In *Holt v. United States*, 218 U. S. 245, 250-251 (1910) the trial court denied motion for new trial on the ground that jurors had been allowed to sepa-

In *Fairmont Glass Works v. Coal Co.*, 287 U.S. 474, 481 (1933), the plaintiff moved for new trial on the ground that if it was entitled to judgment, the evidence clearly required judgment on the verdict found much in excess of the one dollar quoted. This Court held (p. 481):

"The rule that this Court will not review the action of a federal trial court in granting or denying a motion for new trial for error of fact has been settled by a long and unbroken line of decisions."

Four reasons for the asserted rule are stated (287 U.S. 474, 481-482):

(1) The Judiciary Act of 1789, sec. 22, provided that there should be "no reversal in either (Circuit or Supreme) court on such writ of error * * * for any error in fact."

(2) The Seventh Amendment: "No fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

(3) Historical limitation of the writ of error to only those matters within the record of which the motion for new trial was not a part.

(4) The granting or refusing of a motion for new trial is a matter within the discretion of the trial court.

But no rule is any stronger than the reasons that support it. Research of which this Court obviously has not had the benefit demonstrates that none of the above reasons advanced in the *Fairmont* case (1933) now obtains with respect to motions for new trial directed to the issue whether false swearing has deprived of the Constitutional right to a fair trial:

rate and had read articles in the daily paper with respect to the case. The court said (p. 251): "We are dealing with a motion for a new trial, the denial of which cannot be treated as more than a matter of discretion or as ground for reversal, except in very plain circumstances indeed."

(1) Section 22 of the Judiciary Act of 1789 (carried into 28 U. S. C. sec. 879) made applicable to the substituted appeal (28 U. S. C. Secs. 861a, 861b), it has only recently been held by this Court, does not apply to criminal cases. *Roche v. Evaporated Milk Ass'n*, 319 U. S. 27, 39, n. 3 (1943).⁶

(2) The motion for new trial presented no jury question within the Seventh Amendment and no jury has ever passed on the question presented. Manifestly, inapplicable, therefore, is the inhibition of the Seventh Amendment against re-examination of any "fact tried by a jury" other than according to the common law. Cf. *Parsons v. Belford*, 3 Pet. 443, 447-448.

(3) By Section 269 of the Judicial Code as amended by Act of February 26, 1919, c. 48, 40 Stat. 1181 (28 U. S. C. sec. 391) the record is now amplified so as to include motion for new trial. *Fairmont Glass Works v. Coal Co.*, 287 U. S. 474, 482; *Harrison v. United States*, 7 F. 2d 257, 262 (C. C. A. 2 1925).

(4) Exercise of so-called discretion by the trial court on motion for new trial with respect to questions not passed upon by the jury and not otherwise presented to the court is subject to appellate review. Regard for the historical development of the rule demonstrates that the so-called abuse of discretion rule governing appellate review was evolved as a means of liberalizing the so-called doctrine that rulings on motion for new trial lay in the sole discretion (meaning jurisdiction) of the trial court. The same historical development when traced also discloses that the later "rule" is a mere statement of the result of application of the three other technical rules referred to in the

⁶ It is pertinent to note that the so-called doctrine that new trial is a matter of discretion grew up at a time when this Court had no review power over criminal cases except on division of opinion in the circuit courts. See *United States v. Sanges*, 144 U. S. 310, 321.

Fairmont case which are, as shown above, either outmoded or inapplicable here.

The rule that grant or denial of new trial "rested in the sole discretion of the trial court and are not subject to review by writ of error" was obviously harsh in cases where newly discovered evidence or new matters never before considered were being brought forward by such motions. As a consequence, the courts began to scrutinize with minute care the question of whether the trial court had exceeded its jurisdiction or improperly refused to accept jurisdiction, and by rulings in the nature of prohibition or mandamus directed further consideration of certain cases, using the phraseology, however, "abuse of discretion" which meant there had been an improper usurpation or rejection

⁷ The earliest statement by this Court appears in *Henderson v. Moore*, 5 Cr. 11, where on writ of error dealing with a motion of the plaintiff for new trial based on affidavits tending to prove the full amount of the obligation sued upon to be due and surprise by unexpected testimony at the trial, Marshall, C. J., said that this Court had decided at the last term, "that a refusal by the court below to grant a new trial was not error."⁸ This obviously referred to the fact that action on a motion for a new trial was not included in the record on writ of error. In *Marine Ins. Company v. Young*, 5 Cr. 187, the trial court had refused to sign a bill of exceptions to the refusal to grant a new trial on the ground that the verdict was contrary to the evidence. Livingston, J., referred to the language of Section 22 of the Judiciary Act of 1789 saying: "Can this Court reverse for error in fact?" The opinion of the Court by Cushing, J., went off on the constitutional ground. In *Barr v. Gratz*, 4 Wheaton 213, 220, it was held that it had already been decided that refusal to grant a new trial "affords no ground for writ of error." In *Parsons v. Bedford*, 3 Pet. 433, 447, the Court again relied on the Seventh Amendment and Section 22 of the Judiciary Act. In *Zacharie v. Franklin*, 12 Pet. 151, 163, the Court for the first time said: "The granting or refusing of new trials rests in the sound discretion of the court below; and is not the subject of reversal in this Court." It is obvious that this and the other decisions cited by this Court in *Fairmont Glass Works v. Coal Co.*, 287 U. S. 474, 482, n. 8, rely on one or more of the other technical grounds to which reference is made in the *Fairmont* case and which grounds were early recognized as applicable to the cases of the type in which the phraseology of "discretion" was later used.

of jurisdiction. *Mattox v. United States*, 146 U. S. 140; *Ogden v. United States*, 112 Fed. 523, 525 (C. C. A. 3, 1902); *Felton v. Spiro*, 78 Fed. 576; *Dwyer v. United States*, 170 Fed. 160, 165 (C. C. A. 9, 1909). Now that all doubt of the appellate court's jurisdiction to review an order granting or denying a motion for new trial has been laid at rest the questions "What is discretion?" and "How is its abuse determined?" on appeal are no longer shrouded in obscurity. It is clear today that a District Court properly presented with a claim of invasion or deprivation of legal right for the first time on a motion for new trial does not have discretion to disregard applicable and controlling judicial precedents, statutes or constitutional provisions in disposing of the motion. The District Court is bound by such limitations in acting upon a motion for new trial just as he would be if the matter were presented by motion, objection, or request for ruling or order at any other stage of the proceedings. For example, it is plain from the opinion of this Court in *Glasser v. United States*, 315 U. S. 60, 87 that Glasser's claim that the jury had been improperly selected was entitled to precisely the same consideration when presented by motion for new trial based on after discovered evidence as it would have been had he made it on the first day of the trial. The action of the District Court will be reversed as an abuse of discretion if he fails to follow the applicable and controlling judicial precedents, statutes or constitutional provisions, and will be sustained as a proper exercise of it only if he does follow the law. *Glasser v. United States*, 315 U. S. 60; *Dressler v. United States*, 112 F. 2d 972 (C. C. A. 7).

The majority of motions for new trial are made today, as they were in the past, for the purpose of obtaining reconsideration by the trial court of his previous rulings. The vehicle for presenting claims of error in such rulings to the appellate court is assignment of such rulings specifically as error—not by assigning the denial of motion for new trial as error. In such a case the latter assignment is surpluseage.

on appeal because if the appellate court finds the rulings complained of did constitute reversible error it will reverse the judgment and direct a new trial on the basis of those assignments of error and will have no occasion to point out that the trial court repeated his error in denying the motion for new trial based upon those very assignments of error. If the appellate court finds on consideration of the specific assignments of error that the trial rulings complained of do not warrant reversal, it obviously will not hold that the trial court's refusal to grant a new trial on reconsideration of those same rulings constituted error. Implicit therefore in every appellate court opinion refusing to reverse with directions for a new trial upon assigned errors is the holding that it would have been no abuse of discretion for the trial court to have denied a motion for new trial based upon the trial rulings presented for review by such assignments of error. It is customary in such an opinion affirming the trial court, if the denial of such a motion has been assigned as error, for the appellate court to state that the denial of the motion did not constitute an abuse of discretion.

In every case in which on appeal a reversal with direction for a new trial is obtained there is implicit the holding that denial of a motion for new trial, based on the rulings relied on for reversal, would have constituted an abuse of the trial court's discretion; for obviously if the appellate court was required to reverse and direct a new trial the trial court was required to grant it when the same errors were called to his attention. It is not customary in opinions reversing with the directions for a new trial for the appellate court to advert explicitly to the denial of the motion for new trial, it being considered sufficient to discuss the specifically assigned errors on which said motion was predicated. Ordinarily, it is *only* in the case where the appellate court reverses for error raised *for the first time* in the motion for new trial (as in a motion based upon newly discovered evidence) that its opinion will contain explicit state-

ment that the trial court's denial constituted an abuse of his discretion.

It is noteworthy that *Fairmont Glass Works v. Coal Co.*, 287 U. S. 274, 481 and *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247 cited by this Court in its opinion (p. 4) do not deal with the "finding of fact" based upon newly discovered evidence. They involve the denial of motions for a new trial based solely on the claim that the verdict was against the weight of the evidence. In the *Socony* case the court said (p. 248): "Certainly denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review is [citing cases] in substance no more than that is involved here." It is clear that the phrase "error of fact" in these opinions applies only to the factual question of whether the verdict was against the weight of the evidence. These cases, therefore, do no more than reaffirm the uniform rule in federal courts that where the issue has been submitted to a jury a refusal of the trial court to set aside a verdict for claimed "error of fact" in that it was against the weight of the evidence, will not in view of the Seventh Amendment be disturbed on appeal.

In *Miller v. Maryland Casualty Co.*, 40 F. 2d 463 (C. C. A. 2 1930) it was pointed out that such a review would require the appellate court in effect to "decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements." Those cases do not in any way qualify the well established rule that a trial court's findings of fact based upon documentary evidence are subject to review on appeal.

No denial of the facts on which our motion was predicated is contained in any of the Government's evidence except for a few partial denials by Goldstein. In this proceeding, therefore, the affidavits and other exhibits, not con-

tradicted by any Government affidavit or exhibit, stand admitted (*Ogden v. United States*, 112 Fed. 523; *Powell v. Commonwealth*, 112 S. E. 657; *Piper v. State*, 124 S. W. 661). Where, as in this case, there has been an exhaustive investigation by the Government, not only of the facts and the affidavits, but of the "circumstances surrounding" the taking of them, the admission is not merely technical but factual.* These admitted facts alone are enough to prove the falsity of Goldstein's testimony beyond peradventure of doubt.

As this Court pointed out in *Glasser v. United States*, 315 U. S. 60, 87, the reviewing court is required to examine the evidence before it to determine the facts. To the same effect, is the holding of the 10th Circuit in *Pemberton v. United States*, 76 F. 2d 596, and to the same effect is the holding of the United States Court of Appeals for the District of Columbia in *Hamilton v. United States*, 140 F. 2d 679 and *Arbuckle v. United States*, 146 F. 2d 657. All of these criminal cases involving motions for a new trial based on newly discovered evidence demonstrate that

* No denial is made by Goldstein of any of the facts sworn to by the following fourteen witnesses or those contained in the following seven numbered exhibits, all of which relate to transactions in which Goldstein personally participated: Joseph Shaffron (R. 81); Walter Henriksen (R. 91); Samuel Hare (R. 117); Frederick P. Kirschner (R. 122); J. Lawrence Holleran (R. 128); John W. Guild (R. 138); Beatrice Marsh (R. 163); Lester Weil (R. 174); Stewart Peters (R. 187); William R. Peacock (R. 188); Pearl Ferguson (R. 189); Marie Schmidt (R. 191); John Schmidt (R. 192); Eli Herman (R. 231); No. 49 (R. 194); No. 52 (R. 202-204); No. 52-A (R. 206-7); No. 51 (R. 200); No. 24 (R. 157); No. 22 (R. 145-149); No. 40 (R. 185). These facts, like those in the following 20 affidavits and other exhibits submitted by defendants which are not contradicted by any Government affidavits, stand admitted in this proceeding: No. 3-A (R. 96); No. 4 (R. 98); No. 6 (R. 102); No. 7 (R. 103); No. 8 (R. 104); No. 9 (R. 106); No. 10 (R. 108); No. 11 (R. 110); No. 14 (R. 119); No. 15 (R. 120); No. 17 (R. 124); No. 23 (R. 151); No. 25 (R. 162); No. 29 (R. 166); No. 30 (R. 167); No. 31 (R. 169); No. 32 (R. 171); No. 33 (R. 173); No. 35 (R. 176); No. 36 (R. 177); No. 38 (R. 179); No. 41 (R. 186); No. 45 (R. 190); No. 48 (R. 193); No. 51 (R. 200); No. 56 (R. 218); No. 57 (R. 219); No. 63 (R. 226); No. 66 (R. 230).

the duty of the appellate court to examine affidavits and other documentary evidence upon which a "finding of fact" by the trial court is based, is the same on an appeal from the denial of motion for new trial as it is on an appeal in which error is assigned to the denial of the highly discretionary motion for preliminary injunction, or to any other order of a trial court.

The absence in this case of the statutory and constitutional inhibitions upon review for motions of new trial to which reference is made in the *Fairmont* case amply justifies reconsideration of the decision of the Court in this case.

(2) The Circuit Court of Appeals Held as a Matter of Law that the Findings of the Trial Court Were Without Justification on the Facts or the Inference Properly to be Drawn Therefrom.

The reversal by the circuit court of appeals was not for error of fact within the meaning of the *Fairmont Glass Works* case. The circuit court of appeals found that the inferences and conclusions of the trial court were without basis in logic or reason (AR. 213, 214-220) and that it had wrongfully as a matter of law dismissed as "merely cumulative" (AR. 230) affidavits showing Goldstein's false testimony (R. 128, 138) which were uncontradicted (AR. 221, 225). And, referring to the affidavits of Goldstein, it concluded (AR. 225):

"The proof therein contained affords no *substantial support* for a finding that he testified truthfully at the trial."

No one has suggested that the affidavits of the Government agents tend affirmatively to show that Goldstein testified truthfully. And the affidavit of his son, Ted Goldstein, by its failure to corroborate Goldstein's testimony that Ted had given Johnson a quit-claim deed makes against Goldstein's testimony and certainly does not support it on this important phase of his false swearing.

It does not make much difference whether the formula "substantial evidence" or "any evidence" or "evidence

compelling to only one conclusion" be used. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. *Galloway v. United States*, 319 U. S. 372. And it is clear that a trial court ruling on a motion for a directed verdict on the ground that the evidence is so overwhelmingly on one side that no reasonable man could find but one way is open for review by the appellate court as a matter of law. *Gunning v. Cooley*, 281 U. S. 90, 94; *People's Savings Bank v. Bates*, 120 U. S. 556, 562; *Southern Pacific Co. v. Pool*, 160 U. S. 438, 440; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 417. Cf. *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, 74 Fed. 463.

Obviously it was necessary for the court to review the facts shown by the evidence in order to determine whether they with the inferences legitimately to be drawn therefrom did constitute evidence adequate to support the findings of the district judge.

This Court suggests that the only objection was to the trial court's findings on "conflicting evidence" and that this does not present a reviewable issue of law. It would appear to be elementary that even where it is conflicting evidence may, on the points in issue, be inadequate as a matter of law to sustain the ultimate finding of the trial court. Either a conclusion based on no substantial evidence must not be questioned, or else the appellate court can determine whether there is or is not substantial evidence to support the order of the trial court. Plainly this determination can be made only by examining the evidence in the record to determine whether the facts so shown and all inferences that may reasonably be drawn therefrom are, taken together, adequate as a matter of law to sustain the conclusion of the court below.

This Court without even purporting to examine, or refer to any evidence in the record, nevertheless, holds that the

trial judge's findings "were supported by evidence." This Court's calm assurance that the trial judge's findings were supported by evidence is singularly comparable to its citation in *Fairmont Glass Works v. Coal Co.*, 287 U. S. 474, 481, n. 5 of *Southern Railway Co. v. Walters*, 47 F. 2d 3, 7 (1931) in support of the proposition that there can be no review by the circuit court of appeals of denial for motion of new trial. There the circuit court of appeals after a close study of the record had reached the conclusion "we are of the view that there was substantial evidence to sustain the verdict". On certiorari, however, this Court had already held that the evidence on the issue "was so unsubstantial and insufficient that it did not justify a submission of that issue to the jury", and reversed. *Southern Railway Co. v. Walters*, 284 U. S. 190, 194. Inferences there made were held to amount to sheer speculation unjustified in light of other facts shown by the evidence.

It would appear that such questions are not by any Court lightly to be determined by a "casual perusal" of the record. Particularly must this be true where, upon a question of perjury, the State itself has such a great interest.

(3) The Circuit Court of Appeals Had Power to Order New Trial for Error in Fact.

Even if the decision of the circuit court of appeals be regarded as a reversal of the trial court for error in fact because based on conflicting evidence, there are ample precedents for such action.

Where the evidence is entirely documentary the appellate court, equally with the trial court, is in as good a position to, and may, determine the facts and draw inferences of fact. *The Natal*, 14 F. 2d 382, 384 (C. C. A. 9) cert. den. 273 U. S. 748; *Uihlein v. General Electric Co.*, 47 F. 2d 997, 1001 (C. C. A. 7); *Nashua Mfg. Co. v. Berenzweig*, 39 F. 2d 896, 897 (C. C. A. 7); *Kaesler & Blair v. Merchants Ass'n*, 64 F. 2d 575, 576 (C. C. A. 6); *The Marsodak*, 94 F. 2d 339, 341 (C. C. A. 4); *United States v. Corporation of the President*,

etc., 101 F. 2d 156, 160 (C. C. A. 10); *Groves Laboratories v. Brewer & Co.*, 103 F. 2d 175, 178 (C. C. A. 1); *Himmel Bros. v. Serrick Corporation*, 122 F. 2d 740, 742 (C. C. A. 7); *Bowles v. Carnegie-Illinois Steel Corp.*, 149 F. 2d 545, 546 (C. C. A. 7). This rule has been given the same application in cases where the relief involved was discretionary. *Nashua Mfg. Co. v. Berenzweig*, *supra* (citing *Elbers et al. v. Chicago Printed String Co.*, 39 F. 2d 315); *Corica v. Ragen*, 140 F. 2d 496. The same rule was recently reiterated in *Letcher County v. Defoe*, 151 F. 2d 987, 990 (C. C. A. 6):

"The evidence consisted entirely of written instruments and other writings which a reviewing court is competent to interpret, and is not precluded from doing so by Rule 52 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723e. It remains free to draw the ultimate inferences and conclusions which evidentiary findings reasonably induce. *Kuhn v. Princess Lida of Thurn & Taxis*, 3 Cir., 119 F. 2d 704; *Reinstine v. Rosenfield*, 7 Cir., 111 F. 2d 892. Indeed, it is the duty of the reviewing court to review the evidence in order to determine whether decision below was or was not clearly erroneous, and that duty becomes the more imperative where the trial court has had no occasion to observe witnesses or to judge of their credibility in arriving at a factual basis for decision."

The same rule is applicable in criminal cases and the decision of this Court to the contrary in the instant case would appear to overrule *sub silentio* two recent cases in the Court of Appeals for the District of Columbia. In *Hamilton v. United States*, 140 F. 2d 679 (1944) the Court not only reviewed but reversed the trial court's denial of a motion for new trial based on a finding of fact on newly discovered and conflicting evidence. The court, reviewing the trial court's interpretation of one of the defendant's affidavits, concluded (p. 681):

"This does not seem to us a correct evaluation of the statement of Thelma Matthews as new evidence."

Also applicable is the statement in the same decision (pp. 681-682):

"An affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused. Ambiguities should not be resolved in favor of the prosecution without inquiry of the proposed witness. This is particularly true in a case where the sole evidence to support a conviction is the word of the arresting officer, and where in addition the prosecution without any apparent reason has declined to produce corroborating evidence which the record shows might have been offered. *Under such circumstances we think it was an abuse of discretion when the trial court indulged in a hypothetical interpretation of the statement of newly discovered evidence in order to make it consistent with the testimony it was intended to rebut.*" (Italics supplied.)

Again in *Arbuckle v. United States*, 146 F. 2d 657, the Court of Appeals for the District of Columbia held that a single item of newly discovered documentary evidence inconsistent with the testimony of a government witness adequately fulfills the requirement as to the showing of falsity of the witness's testimony, and dictated a reversal of the trial court's denial of the motion for new trial.

It is to be noted that it seems plain that the fact that review is by writ of error does not *per se* prevent review of errors in fact that might under some circumstances be triable by a jury. As the rule has been stated by this Court, it is apparent that it is subject to no rigid restrictions such as would be imposed by a rule that questions of law only are reviewable on writ of error. In *Holt v. United States*, 218 U. S. 251, it is stated:

"We are dealing with a motion for a new trial, the denial of which cannot be treated as more than a matter of discretion or as ground for reversal, *except in very plain circumstances indeed.*" (Emphasis supplied.)

And in the instant case this Court states (p. 3):

"Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remains undisturbed *except for most extraordinary circumstances*, we granted certiorari." (Emphasis supplied.)

Obviously, the exceptions indicate the existence of no rigid rule. That the court reviewing denial of a motion for new trial may consider errors of fact, not within the record made on the trial proper, but rendering illegal and invalid the whole proceeding is recognized in 2 *Bishop, New Criminal Procedure* (2nd ed.) sec. 1369, and is borne out in *Cornhill's Case*, 1 Lev. 149, 83 Eng. R. Repr. 342 and *Anonymous*, 3 Salk. 147, 91 Eng. R. Repr. 743. See 1 *Holdsworth, History of English Law*, pp. 370-371.

CONCLUSION.

It is submitted that respondents on their amended motion for new trial have been deprived of appellate review of one of the alternative grounds for granting their motion.

It is also clear that by the form of the direction for mandate contained in the opinion of this Court, respondents have been wrongly deprived of review of their numerous assignments of error on appeal from their convictions directed to the proceedings on the original trial. Their right to have these assignments considered by the circuit court of appeals was impliedly recognized in the direction for mandate contained in the opinion of this Court reversing the circuit court of appeals on the merits. To now deprive them of that right unjustly penalizes them for seeking a fair trial.

The peculiarity of the question of fact presented by a motion for new trial on false swearing—an issue never considered by a jury—and the authorities cited above make plain that the decision of this Court is founded on prece-

dents the pertinence of which is questionable. In any event respondents should at least be afforded a hearing on a question which was never indicated as constituting a question on review in this Court and at most merely lurked in the record.

Respectfully,

HOMER CUMMINGS;
*Attorney for William R. Johnson,
 Jack Sommers, James A. Hartigan,
 William P. Kelly and Stuart Solomon
 Brown, Respondents.*

WILLIAM J. DEMPSEY,
*Attorney for William R.
 Johnson, Respondent.*

HAROLD R. SCHRADZKE,
*Attorney for Jack Sommers, James
 A. Hartigan, William P. Kelly and
 Stuart Solomon Brown, Respondents.*

February, 1946.

CERTIFICATE OF COUNSEL.

I, Homer Cummings, counsel for the above-named respondents, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

HOMER CUMMINGS,
*Counsel for William R. Johnson,
 Jack Sommers, James A.
 Hartigan, William P. Kelly
 and Stuart Solomon Brown,
 Respondents.*

SUPREME COURT OF THE UNITED STATES.

Nos. 115 and 116.—OCTOBER TERM, 1945.

115 The United States of America,
 Petitioner,
 vs.
 William R. Johnson.

116 The United States of America,
 Petitioner,
 vs.
Jack Sommers, James A. Hartigan,
William P. Kelly and Stuart
Solomon Brown.

On Writs of Certiorari to
the United States Court of
Appeals for the Seventh
Circuit.

[February 4, 1946.]

Mr. Justice BLACK delivered the opinion of the Court.

On October 12, 1940, after a federal district court trial lasting more than six weeks, a jury found respondent Johnson guilty of wilfully attempting to defeat and evade a large part of his income taxes for the calendar years 1936-1939 and of conspiring to do so; the other respondents were convicted and sentenced for conspiring with and aiding and abetting him.¹ From the time of these convictions until now, enforcement of the sentences was delayed by persistent efforts to obtain a new trial. Though there has been no second trial the case is here for the third time.

September 21, 1941, was the date when the Circuit Court of Appeals first reversed the conviction, one judge dissenting. 123 F. 2d 111. June 7, 1943, we reversed and remanded the case to the Circuit Court of Appeals, 319 U. S. 503. Respondents then asked that Court to remand the case to the trial court to permit a motion for a new trial on the ground of newly discovered evidence.² The Circuit Court acting pursuant to Rule II(3) of the

¹ The respondent Brown was found guilty only on the conspiracy count and counts 3 and 4, the substantive counts for 1938-1939.

² Previously respondents had applied to Mr. Justice Frankfurter for a stay of mandate pending petition for rehearing. Mr. Justice Frankfurter's denial of the motion specifically stated that it was to be "without prejudice, however, to the consideration and disposition by the United States Circuit Court of Appeals for the Seventh Circuit of any motion filed under Rule 2(3) of the Criminal Appeals Rules" (R. 10).

Criminal Appeals rules³ remanded the case and on October 29, 1943, respondents, with leave of the trial court, filed a motion for a new trial. The respondents alleged that the newly discovered evidence proved that Goldstein, a government witness at the trial, was unworthy of belief and had committed perjury in testifying that certain properties were purchased by him on behalf of Johnson and with money supplied by Johnson. To support their charges against Goldstein respondents offered numerous affidavits. The Government filed an answer to the motion and a number of counter-affidavits. And among the papers before the court were affidavits by Goldstein reaffirming his testimony at the trial. The trial judge in a carefully prepared opinion covering fifty-six pages of the record, gave thoughtful consideration to each affidavit, reached the conclusion that none of them showed that Goldstein had perjured himself, and found both from the new affidavits and his own knowledge of the original six-weeks trial, that Goldstein's testimony was true. The motion for a new trial was consequently denied.

The Circuit Court of Appeals affirmed. 142 F. 2d 588. It unanimously held that it could not substitute its judgment on the facts for that of the trial judge; that it did not have power to try these facts de novo; that it could review the record for errors of law, to determine, among other things, whether the trial judge had abused his discretion; that a review of the new evidence in the record did not inevitably lead to the conclusion that Goldstein had testified falsely; that the trial judge had not reached his conclusion "arbitrarily, capriciously, or in the misapplication of any rule of law" and hence had not abused his discretion. The respondents thereupon filed a second petition for certiorari in this Court. While this petition was pending, respondents presented papers informing us that they had discovered still more new evidence tending to discredit Goldstein's original testimony. We deferred consideration of their case, which we later dismissed, 323 U. S. 806, and they, after obtaining a second remand from the

3 "II. Motions.

"(3) A motion for a new trial solely upon the ground of newly discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time after final judgment."

Circuit Court of Appeals, filed an amended motion for new trial in the District Court. The trial court again wrote an opinion analyzing each new affidavit in detail. These additional affidavits contained statements which had they been offered as testimony at the original trial would have been admissible and relevant to discredit Goldstein's and buttress Johnson's testimony. At least some of the facts set out in the affidavits had not been discovered until shortly before the amended motion was made. But the trial court concluded that the new affidavits failed to prove that Goldstein had committed perjury, and that consequently the basic ground for the motion—that there was new evidence showing that Goldstein had perjured himself—was without foundation.⁴ That court found again that the new and old evidence taken together affirmatively showed that Goldstein had been a truthful witness. This time, however, the Circuit Court of Appeals reversed with one judge dissenting. 149 F. (2d) 31. The reversal rested basically on the Court's belief that the trial judge had erroneously found that Goldstein did not commit perjury. The majority of the Court reviewed parts of the affidavits and concluded from them that the trial judge's finding that Goldstein did not commit perjury was illogical and unreasonable. The majority substituted its own finding that Goldstein's original testimony was "unerringly false" and held that the trial judge's contrary conclusion amounted to an abuse of discretion. Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari.

In our opinion the Circuit Court of Appeals erred. The appeal to that court was so devoid of merit that it should have been dismissed. The crucial question before the trial court was one of fact: Did the new evidence show that Goldstein's original testimony was

⁴ An alternative ground for the Court's denial of the motion need not be considered here. For as will be seen we think that the trial court's findings that the so-called new evidence failed to show Goldstein's perjury should not have been upset. The alternative ground was that all the so-called newly discovered evidence was either not newly discovered, or merely cumulative or impeaching, and in any event would probably not produce a different result. In this aspect of the case, the trial court, as did the Circuit Court of Appeals in its first opinion, relied on the frequently quoted and followed rule announced in *Berry v. Georgia*, 10 Georgia 511.

false.⁵ The trial judge after carefully studying all the evidence found that there was nothing to show perjury on the part of Goldstein, that Goldstein had in fact told the truth, and concluded that a new trial was not warranted. The trial court thus answered the above question in the negative. Two judges of the Circuit Court of Appeals thought that the evidence compelled an affirmative answer. But it is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren v. United States*, 217 U. S. 509; *Holt v. United States*, 218 U. S. 245; *Fairmount Glass Works v. Coal Co.*, 287 U. S. 474, 481. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, cf. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247; *Glasser v. United States*, 315 U. S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

The trial judge's findings were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for a new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration. We think that even a casual perusal of this record should have revealed to the Circuit Court of Appeals that here nothing more was involved than an effort to upset a trial court's findings of fact.

Determination of guilt or innocence as a result of a fair trial, and prompt enforcement of sentences in the event of conviction, are objectives of criminal law. In the interest of promptness, Rule II(2) of the Criminal Appeals Rules requires that motions for new trial generally must be made within three days after verdict or

⁵ In addition to questions involving the merely impeaching or cumulative effect of the evidence, which we have already indicated need not be considered here, see note 2, *supra*, we also need not consider what criteria should have guided the court in passing on the motion, had respondents actually shown that Goldstein recanted his testimony or that he committed perjury. Compare *Larrison v. United States*, 24 F. 2d 82, with *Berry v. Georgia*, *supra*, note 2. For as later appears we consider the District Court's finding, that Goldstein's testimony was not shown to have been false, not reviewable. That was sufficient to warrant a denial of the motion.

finding of guilt, and Rule III requires appeals to be taken within five days. But motions for new trial on the ground of newly discovered evidence have been more liberally treated. They can, under Rule II(3) be made at any time within sixty days after judgment, and in the event of an appeal, at any time before final disposition by the Appellate Court. This extraordinary length of time within which this type of motion can be made is designed to afford relief where despite the fair conduct of the trial, it later clearly appears to the trial judge that because of facts unknown at the time of trial, substantial justice was not done. It is obvious, however, that this privilege might lend itself for use as a method of delaying enforcement of just sentences. Especially is this true where delay is extended by appeals lacking in merit. This case well illustrates this possibility. While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The Circuit Court of Appeals was right in the first instance, when it declared that it did not sit to try *de novo* motions for a new trial. It was wrong in the second instance when it did review the facts *de novo* and order the judgment set aside.

The appeal to the Circuit Court of Appeals was instituted by notice of appeal under Rule III of the Criminal Appeals Rules. Rule IV gives the Circuit Court of Appeals power to supervise and control all proceedings on the appeal and to expedite such proceedings by, among other things, entertaining motions to dismiss. *Ray v. United States*, 301 U. S. 158, 164; *Mortensen v. United States*, 322 U. S. 369. Under that Rule the Circuit Court of Appeals here, after studying the issues raised, and upon determining that the only objection was to the trial court's findings on conflicting evidence, should have decided that this does not present a reviewable issue of law and on its own motion have dismissed the appeal as frivolous.⁶

⁶ *Alberts v. United States*, 21 F. 2d 968; *Corrigan v. Buckley*, 271 U. S. 323, 329; *Avent v. United States*, 266 U. S. 127, 131; *Sugarman v. United States*, 249 U. S. 182, 184; *Zucht v. King*, 260 U. S. 174, 176; *Campbell v. Olney*, 262 U. S. 352; *Seaboard Airline Ry. Co. v. Watson*, 287 U. S. 86, 90, 92; *Salinger v. United States*, 272 U. S. 542, 544; *Krader v. Indiana*, 205 U. S. 570; *Cady v. Georgia*, 323 U. S. 676.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court to enforce the judgments against the petitioners.

It is so ordered.

Mr. Justice JACKSON and Mr. Justice MURPHY took no part in the consideration or decision of this case.